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No. 92-715

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1992

RICHARD F. ULLOA and DAVID J. ULLOA,
Petitioners

-- V. --

WESTERN SYSTEMS, INC. and LEE M. HOLMES,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

MARK SNYDER HOLMES
Counsel of Record
530 West O'Brien Drive
Agana, Guam 96910
Telephone: (671) 477-9334

VERNON F. L. CHAR
Char Sakamoto Ishii & Lum
841 Bishop Street, Suite 850
Honolulu, Hawaii 96813
Telephone: (808) 522-5133

Counsel for Respondents

QUESTION PRESENTED FOR REVIEW

Did the district court err in enjoining two Guam suits that sought to collaterally attack and circumvent the final judgments resulting from eighteen years of federal litigation, including two trials and four separate appeals to the Ninth Circuit Court of Appeals?

PARTIES

Pursuant to Rule 29.1, Western Systems, Inc. subsidiaries are all wholly owned. Western Systems, Inc. has no parent.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

In this case there have been two trials, an evidentiary injunction hearing, and six appeals to the Ninth Circuit Court of Appeals. The previous opinions are as follows:

1. The unpublished February 16, 1977 decision in *Ulloa v. Guam Economic Dev. Auth.*, United States District Court for the District of Guam, Civ. No. 24-72, Appendix at 1b.

2. The unpublished November 18, 1977 decision and judgment in *Guam Economic Dev. Auth. v. Ulloa*, United States District Court for the District of Guam, Civ. No. 197-72, Appendix at 28b.

3. The March 21, 1974 memorandum opinion of the Ninth Circuit Court of Appeals, Civ. No. 72-3159, denying the Ulloas' appeal of the disqualification of their counsel. 9th Cir. CR. 129.

4. *Ulloa v. Guam Economic Dev. Auth.*, 580 F.2d 952 (9th Cir. 1978), affirming the district court's decision in Civ. No. 24-72, Appendix at 36b.

5. *Guam Economic Dev. Auth. v. Ulloa*, 628 F.2d 1356 (9th Cir. 1980), affirming without published decision the district court's decision in Civ. No. 197-72.

6. *Guam Economic Dev. Auth. v. Ulloa*, 841 F.2d 990 (9th Cir. 1988), affirming the enforceability of the federal judgments against the Ulloas. Appendix at 51b.

7. The unpublished May 11, 1990 decision in *Guam Economic Dev. Auth. v. Ulloa*, United States District Court for the District of Guam, Civ. No. 197-72, enjoining the Ulloas from relitigating their claims in the local Guam court, Petitioners' Appendix 33a-53a.

8. *Western Systems, Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992), consolidated appeals Civ. Nos. 90-15732 and 90-16407, affirming the injunction against the Ulloas, Petitioners' Appendix 1a-16a.

JURISDICTION

Respondents agree with the jurisdictional statement of petitioners. Although the Ninth Circuit remanded the case for further hearing on the amount of attorneys fees to be awarded as sanctions, the pendency of a fee dispute does not affect the finality of the underlying injunction. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988).

STATUTES INVOLVED

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651.

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."
28 U.S.C. § 2283.

STATEMENT OF FACTS

The petitioners David and Richard Ulloa began this case in the federal district court of Guam more than twenty years ago. More than fifteen years ago, following two separate trials, the district court found them guilty of unclean hands and misrepresentation, and liable for issuing watered stock to themselves. These findings were affirmed on appeal by the Ninth Circuit Court of Appeals. The petitioners failed to pay the federal judgments against them for over twelve years. Finally, pretending to settle, they agreed to pay the judgments if they received a $132,000.00 discount. Respondents agreed. One hour after the settlement was filed in federal court, petitioners filed two new suits against respondents in the local Guam court based on the same alleged contracts rights litigated for almost eighteen years in the federal courts. The district court again found them in bad faith, enjoined the new cases in the local Guam court, and imposed sanctions. The Ninth Circuit affirmed the injunction, but vacated the sanctions award to allow petitioners a further opportunity to challenge the amount. The petitioners now seek review of this twenty year old case.

The Ulloas are among the original incorporators of Marianas Communications Systems, Inc. ("MCS"), now known as Western Systems, Inc. ("WSI"), one of the respondents. In 1968, they formed MCS for the purpose of providing cable TV service in the

territory of Guam. As the district court later found, the Ulloas misrepresented their capital contributions to MCS:

> At the time, the original four shareholders indicated on the corporate books that the $230,000 worth of stock that had been subscribed to was paid in full in exchange for the efforts expended in obtaining the loan. No cash or property was ever paid for the 23,000 shares issued.

Cruz v. Guam Economic Dev. Auth., D.Guam, Civ. No. 24-72, February 16, 1977 Opinion at 2, Appendix at 2b. Instead of their own capital, the Ulloas used the proceeds of a loan guaranteed by a governmental development agency, the Guam Economic Development Agency (GEDA). By May 1971 "the company was indisputedly in grave financial trouble and was insolvent." *Id.*

To keep the company alive, GEDA agreed to take over MCS and its debt. On May 21, 1971, the Ulloas and the other shareholders sold their stock for $1.00 each to GEDA. The former shareholders retained a "collective" right of first refusal if GEDA resold the stock, on condition that they pay a minimum purchase price of $421,000, the outstanding debt of MCS. They falsely warranted to GEDA that the shares were "lawful." *Id.* at 4.

GEDA approached respondent Holmes as a prospective buyer of the company. *Id.* at 6. On July 14, 1971, Holmes made a proposal to purchase 70% of MCS stock from GEDA at $2 a share. On July 20, 1971, after extensive negotiations, the Ulloas signed a contract giving up their right of first refusal, but receiving certain MCS stock options. These options were subsequently detailed in an "Agreement For Sale of MCS Stock," dated August 4, 1971.

In paragraph 1 of the contract Holmes agreed to purchase 70% of MCS stock for $2 a share. In paragraph 2, MCS agreed to "make available" 15% of its stock to the former shareholders, including the Ulloas, for $1 a share. In paragraph 3, GEDA agreed to offer the remaining 15% of MCS stock in equal amounts to 5 persons,

including David Ulloa, for $4 a share (plus a 10% increase each year) when the MCS debt to GEDA was "repaid in full." *Id.* at 6-12.

In July and August, 1971, the Ulloas signed subscription agreements and promissory notes to purchase their portion of the reissued MCS stock, but for tactical reasons later decided not to pay the full amount due. Their stock purchase contracts were cancelled for nonpayment in 1972. May 11, 1990 Injunction Order, petitioners' Appendix at 36a-37a.

Thereafter, Holmes invested personally or obtained the investment of $219,000 in new capital for MCS, "moved himself and his family to Guam," "devoted his constant labor to MCS," and "personally guaranteed loans to MCS." Feb. 16, 1977 Decision at 30-32, Appendix at 25b. As a result of "large cash liabilities and considerable time, effort and reputation on the part of Holmes," MCS "turned around, reached the breakeven point and was faced with the prospects of a bright future." *Id.* at 32.

On February 28, 1972, the Ulloas, and other former shareholders, filed suit in the Guam federal district court against GEDA and Holmes seeking shares of MCS stock. *Cruz v. Guam Economic Dev. Auth.*, Civ. No. 24-72 CR 1, Exh. "G" EOR at 337. The 1971 contracts were attached to their complaint. They alleged that Holmes "at all times acted in bad faith and conspired" with GEDA to deprive the Ulloas of their shares. The Ulloas sought a constructive trust, an accounting, and $15 million in damages. May 11, 1990 Order, petitioners' Appendix at 37a.

On November 28, 1972, GEDA, Holmes and MCS sued the Ulloas for their breach of warranty in the 1971 contracts, and to collect the unpaid stock subscriptions owed MCS. *Guam Economic Dev. Auth. v. Ulloa*, United States District Court for the Territory of Guam, Civil No. 197-72. The complaint specifically referred to the 1971 contracts, alleging that the "warranties and representations of [the Ulloas] as set forth in said contracts...were false and untrue." *Id.* at 37a-38a.

During the discovery phase of these two cases, the district court found "the Ulloas had the opportunity to inspect all stock transactions involving MCS between 1971 and 1973." *Id.* at 38a.

Thus, they "had the opportunity to investigate fully their rights to stock not purchased by the other former stockholders." *Id.* at 48a.

The Ulloas' suit, Civ. No. 24-72, went to trial in 1975. The Ulloas' rights to purchase MCS shares pursuant to the August 4, 1971 agreement were the subject of frequent testimony. 24-72 Tr. at 654-56, 1141-42, 1151-54, 1235-38. The August 4, 1971 contract was admitted into evidence as Exh. AA. David Ulloa testified that he was aware of his rights to purchase MCS stock and, as general manager of MCS, even pressured other former shareholders to purchase their shares. 24-72 Tr. at 563-64, 577, 649-54, 796-97, 1230. According to Ulloa, Holmes made "constant requests" for the former shareholders to buy their stock. *Id.* at 1230.

Holmes testified that the Ulloas made downpayments for their stock, but had failed to pay the balance due. 24-72 Tr. at 1151-57. The Ulloas' subscription agreements, stock certificates, and promissory notes were admitted into evidence as Exh. GG. Holmes testified that the Ulloas' subscription agreements were cancelled in 1972 for nonpayment. 24-72 Tr. at 1153-54.

On February 16, 1977, the district court issued a 34 page opinion rejecting all claims made by the Ulloas and finding them guilty of unclean hands:

> Plaintiffs, and each of them, lack clean hands to bring an equitable action seeking the imposition of a constructive trust for the stock of MCS acquired by defendant Holmes, for the reason that the shares of stock of MCS originally issued were issued contrary to the provisions of law . . . David Ulloa himself was a witness to the August 4, 1971 agreement and was one of the primary beneficiaries of the unlawful issuance of stock....

> Plaintiffs cannot be permitted to come into a court of equity to attempt to recapture a company which they claim, as of February, 1972, is worth $15,000,000 after (1) investing only $30,000 to $40,000, (2) *misrepresenting* the value of the corporation's capital unlawfully as $300,000, (3) requiring the loan by GEDA of an additional $270,000 and subsequently another $75,000, and (4) encouraging outside equity parties under the reorganization, including Holmes, to invest approximately $219,000 more. The company was insolvent and floundering during the period of time the former stockholders operated it.
>
> After February 1972 when the company was operational and financially feasible, the plaintiffs then suddenly decided that they wished to have the stock and operation of the company returned to them. To benefit the very persons who had created the initial distress condition of the corporation based upon under-capitalization and the unlawful issuance of stock would be inequitable. *The wrongful acts of plaintiffs* are clearly related to the conduct of the subject matter of this litigation.

Id. at 30-32, Appendix at 25b (emphasis added).

The Ulloas appealed. The Ninth Circuit affirmed on all grounds. *Ulloa v. Guam Economic Dev. Auth.*, 580 F.2d 952 (9th Cir. 1978), Appendix at 35b.

The watered stock case against the Ulloas, Civil No. 197-72, was tried before a jury in September, 1977. The August 4, 1971 contract was again admitted into evidence, as Exh. 13. The Ulloas' rights to MCS stock were discussed often during the trial. 197-72 Tr. 355, 380-83, 495, 523, 539-40, 763-64. Following a jury verdict in the Ulloas' favor, the Court granted a partial judgment

notwithstanding the verdict, and found the Ulloas liable for watered stock because "defendants David Ulloa, Richard Ulloa ... failed to pay any legal consideration for these shares." Memorandum Order, Nov. 18, 1977 at p. 7, Appendix at 31b. On November 18, 1977, a judgment in the amount of $153,000 was entered against David Ulloa and $36,000 against Richard Ulloa. *Id.* The Ulloas appealed. The decision was affirmed by the Ninth Circuit without published opinion. *Guam Economic Dev. Auth. v. Ulloa*, 628 F.2d 1356 (9th Cir. 1980).

The Ulloas failed to pay the federal judgments. On March 27, 1979, the federal court issued an Alias Writ of Execution against David Ulloa in the amount of $153,000. On April 4, 1979, the federal court marshal issued a Notice of Levy, levying "any and all" contract rights of David Ulloa arising from the August 4, 1971 contract. On April 12, 1979, the United States marshal conducted the sale. David Ulloa attended and submitted bids through an intermediary. Tr. 4/3/90 at 29. Holmes was the highest bidder and bought the contract rights. David Ulloa did not object to the levy and sale. May 11, 1990 Order, petitioners' Appendix at 39a.

The Ulloas refused to pay the remainder of the judgments for more than 12 years. On August 12, 1986, the federal district court ruled that WSI could continue to enforce its judgment against the Ulloas. The Ulloas appealed; the Ninth Circuit affirmed the judgment was enforceable. *Guam Economic Dev. Auth. v. Ulloa*, 841 F.2d 990 (9th Cir. 1988). The district court ordered the Ulloas to begin monthly payments on the judgment. When they failed to appear at court hearings, an arrest warrant for both Ulloas was issued on September 8, 1989. May 11, 1990 Order, petitioners' Appendix at 40a. Statutory post-judgment interest had increased the amount owed by the Ulloas to approximately $370,000.00. Tr. 4/3/90 at 30.

Finally, the Ulloas offered to settle the judgments against them, thus ending the federal litigation, if they were given a discount of $138,000.00. WSI agreed. A satisfaction of judgment was entered on December 5, 1989. May 11, 1990 Order, petitioners' Appendix at 40a.

One hour after the satisfaction of judgment was entered, the Ulloas filed two new lawsuits against WSI and Holmes in the Guam Superior Court. *Id.* In *Ulloa v. Western Systems, Inc.*, CV 1223-89, the Ulloas alleged they were denied rights of first refusal to MCS shares granted in "paragraphs 2 and 3 of the agreement for sale of MCS Stock, dated August 4, 1971...." 9th Cir. EOR at 317. The August 4, 1971 contract is attached as an exhibit to the amended complaint. The same claim for 1971 MCS shares is expressed as seven different causes of action, each based on the August 4, 1971 contract. The Ulloas ask the court to "grant 30% of Guam Cable Television to the plaintiffs and the other original shareholders...." *Id.*

In the second suit, *Ulloa v. Holmes*, CV 1224-89, David Ulloa alleged that the 1971 contracts "remain in effect." 9th Cir. EOR at 327. He contended that the federal court's levy and sale of his contract rights "was invalid since the payment for the shares had not been made pursuant to Guam law" and specifically requested the Guam court to declare the federal marshall's sale "null and void." *Id*. By voiding the sale Ulloa sought to revive his claims under the contracts for more Western Systems shares.

WSI and Holmes filed a petition for injunction in the same federal district court of Guam that had heard the Ulloas' claims since 1972. The district court held an evidentiary hearing on April 3, 1990. Testimony and documentary evidence were submitted by WSI and Holmes without objection. The Ulloas presented *no* evidence. Tr. 4/3/90.

On May 11, 1990, the court issued a permanent injunction against the Ulloas. Petitioners' Appendix 33a-53a. The petitioners wrongly contend that "the court acknowledged that the Ulloas' stock and contract claims were not actually raised and litigated in the prior federal proceeding." Petition at 5. In fact, using the definition of

"claim" found in *Restatement (Second) Judgments* § 24, [1] the court held that "the territorial suits filed by the Ulloas concern exactly the same 'transaction or series of connected transactions' involved in previous federal court litigation: the 1971 corporate reorganization of Guam Cable TV, and the Ulloas' claims to stock under the August 4th agreement." *Id.* at 44a. The court held that the remarkable similarity between the Ulloas' discovery requests in the federal and Guam suits further confirmed that the 1989 "claim" made by the Ulloas in Guam court to obtain MCS shares was the same as the 1972 "claim" made in federal court:

> The August 4th agreement was a single agreement. The claims made under paragraph 2 of the agreement are interwoven with the claims made under paragraph 1. As the Ulloas' discovery requests demonstrate, the facts and evidence are the same. Judicial economy and good sense dictate that the same agreement may not be litigated ad infinitum.

Petitioners' appendix at 46a.[2] "res judicata," the court held, "does not permit parties to sue seriatim for different paragraphs of a single contract." *Id.* at 48a.

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1 This definition of "claim" was cited with approval in *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983).

2 The Ulloas contend that the district court should not "rely on new matters not raised or considered in the prior federal proceeding to decide on an injunction petition under the relitigation exception." Petition at 6. Yet, to determine whether a single cause of action exists "the test is whether identical evidence will support the issues involved in both actions." *Thibodeau v. Foremost Ins. Co.*, 605 F. Supp. 653 (N.D. Ind. 1985). Whether the evidence and events at issue in two separate cases are the same necessarily requires some factual investigation by the district court.10

Further, David Ulloa's attempt to "void" the federal court's 1979 levy and sale of his rights to MCS stock "is a direct assault" on the federal court. *Id.* at 49a. The court concluded the Guam suits "had no merit whatsoever and were obviously filed for harassment":

> Such blatant disregard for the final judgments of this court and the Ninth Circuit Court shall not go unsanctioned. The courtroom is not the place for personal vendettas.

Id. at 52a. The court issued a permanent injunction against further litigation by the Ulloas of the claims asserted in the Guam cases. *Id.* The court later awarded WSI and Holmes $28,117.06 in attorneys fees and costs. August 28, 1990 Order.

The Ulloas appealed both the injunction order and the amount of fees awarded, their fifth and sixth appeals to the Ninth Circuit since they first filed suit in 1972. The Ninth Circuit affirmed "both the injunction and the award of sanctions," but remanded "the amount of the sanction to the district court for reconsideration." 958 F.2d at 866. Recognizing that exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, are to be strictly construed, the court nevertheless upheld the injunction because the issues raised in the Ulloas' Guam suits "arose from the same contracts and factual circumstances which had been litigated in federal court for the past seventeen years." 958 F.2d at 871.

In its opinion the Ninth Circuit held that *Chick Kam Choo v. Exxon*, 486 U.S. 140 (1988), did not limit the relitigation exception to *issues* actually litigated in a prior federal case:

> To read *Choo* as the other Circuits have, however, would in essence be to read res judicata entirely out of section 2283. Any issue which was "actually litigated" by the parties in a prior proceeding will be barred by collateral estoppel ("issue preclusion"), without any need to rely on res judicata ("claim preclusion"). This result seems to us to be contrary

> to the purposes of section 2283, as stated by the Supreme Court in *Choo*. It is also contrary to the language of *Choo*, which would bar relitigation of "*claims* or issues [that] actually have been decided." 486 U.S. at 148, 108 S.Ct. at 1690.

958 F.2d at 870 (original emphasis). The court found an injunction was warranted here based on "the compelling circumstances of this case":

> The problems with limiting the relitigation exception to collateral estoppel are particularly evident in this case. This case began twenty years ago. It was litigated for seventeen years in the United States District Court for the District of Guam, and was appealed to this Circuit no less than four times. One hour after the federal case was settled, the Ulloas filed suit in Guam territorial court. The issues raised in that suit arose from the same contracts and factual circumstances which had been litigated in federal court for the past seventeen years. The federal court was far more familiar with the issues presented than the Guam court could have been. Furthermore, the preclusion issues facing the Guam court were issues of federal law. Under the compelling circumstances of this case, we conclude that the principles announced in *Choo* are not disserved by the district court's injunction. We therefore conclude that the relitigation exception to Section 2283 allows the district court to enjoin the Guam litigation on the ground that it is barred by res judicata.

958 F.2d at 871. The Ulloas' petition for rehearing and suggestion for rehearing *en banc* was denied on June 18, 1992. The Ulloas now seek a writ of certiorari from this Court.

ARGUMENT

I. The Present Case Does Not Warrant Review By This Court

The "compelling circumstances" in the present case make it inappropriate for review by writ of certiorari. This is not a case of common application that would give guidance to the lower federal courts in the interpretation of the Anti-Injunction Act and *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). The facts here are egregious: two trials, four appeals, a federal marshal's sale, and eighteen years of federal litigation ostensibly ended by a "final" settlement of the outstanding federal judgments, followed one hour later by new suits attempting to void the marshal's sale and relitigate the same contracts in the local court.

The petitioners have suffered no injustice. In 1977 the district court found they "lack clean hands," and were guilty of "misrepresenting the value of the corporation's capital unlawfully," and "wrongful acts." February 16, 1977 Order at 30-32, appendix at 25b. In 1989, the same court ordered petitioners arrested for failure to appear at judgment debtor examination hearings. In 1990 the district court concluded the petitioners had "blatant disregard for the final judgments of this court and the Ninth Circuit Court" and were engaged in a "personal vendetta." May 11, 1990 Order, petitioners' appendix at 52a. The only injustice in this case has been suffered by respondents, who have endured more than twenty years of litigation:

> We have stressed that the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. *It is a rule of fundamental and substantial justice*, a public policy and a private peace, which will be cordially regarded and enforced by the courts.

Federated Dep't Stores Inc. v. Moitie, 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103, 108 (1981) (emphasis added).

The relitigation exception to the Anti-Injunction Act would be meaningless if the federal courts were powerless to protect parties who prevail after eighteen years of federal litigation from further litigation of the same claims in local courts. "It is always to be understood that Federal tribunals are not moot courts, and that parties having substantial rights must when brought before those tribunals present those rights or may lose them." *Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co.*, 198 U.S. 188, 202 (1905). Despite some controversy as to the precise scope of injunctions allowable under the Act, nothing detracts from the common sense conclusion of the district and circuit courts that this litigation should be over.

Cases similar to the present one are fortunately uncommon. The petitioners' bad faith, their petulant refusal to accept the judgments of the federal courts, their attempt to use the local court to obtain the stock denied by the federal courts are, as the Ninth Circuit found, truly "compelling circumstances." The petitioners' attempt to relitigate the 1971 contracts after losing eighteen years of federal litigation--and pretending to settle--is extraordinary. This case does not deserve further review.

II. The Ninth Circuit's Decision is Consistent With This Court's Opinion in *Chick Kam Choo v. Exxon*

The core of petitioners' certiorari application is their contention that the Ninth Circuit's opinion is inconsistent with this Court's opinion in *Chick Kam Choo v. Exxon*, 486 U.S. 140 (1988). In fact, both opinions are harmonious. Petitioners have simply confused issue preclusion with claim preclusion.[3] *Chick Kam Choo*

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[3] Because there is some confusion in the terminology used by various courts, in this brief we use "claim preclusion" (often, but not always, called res judicata) and "issue preclusion" (often called collateral estoppel) as those terms are used in the Restatement (Second) of Judgments. See discussion in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984).

was a forum non conveniens case in which there was no final judgment *on the merits* in the federal court; the Ulloas' claim for MCS stock was litigated on the merits to final judgment (and beyond) for almost eighteen years. *Chick Kam Choo* was an issue preclusion case, while the present case is a claim preclusion case. This simple distinction disposes of the bulk of petitioners' arguments.

A. The *Exxon v. Chick Kam Choo* Decision

In *Chick Kam Choo*, a federal district court, after determining that Singapore law governed a foreign seaman's claims, dismissed the suit on forum non conveniens grounds. The plaintiff then filed an action in Texas state court. Relying on the relitigation exception to the Anti-Injunction Act, which allows a district court to enjoin state court proceedings when an injunction is "necessary in aid of its jurisdiction, or to protect or effectuate its judgments," 28 U.S.C. § 2283, the district court enjoined the plaintiff from litigating the merits of the case in the Texas court. The Supreme Court reversed.

This Court began its analysis by noting that the Anti-Injunction Act "is founded in the well recognized concepts of res judicata *and* collateral estoppel." 486 U.S. at 147 (emphasis added). "[A]n essential prerequisite for applying the relitigation exception" continued the Court, "is that the *claims or issues* which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." 486 U.S. at 148 (emphasis added).

This Court held that the district court's injunction was overbroad because it precluded the plaintiff from litigating her Singapore law *claims* in the Texas state courts. Claim preclusion was not applicable because "[t]he District Court did not resolve the merits of [the Singapore law] claim in its 1980 order. Rather, the only issue decided by the District Court was that petitioner's claims should be dismissed under the federal forum non conveniens doctrine." 486 U.S. at 148.

Issue preclusion, however, was applicable and the district court's injunction properly precluded further litigation of issues decided by the federal court. "Because in its 1980 decision the District Court decided that Singapore law must control petitioner's lawsuit, a decision that necessarily precludes the application of Texas law, an injunction preventing relitigation of that issue in state court is within the scope of the relitigation exception to the Anti-Injunction Act." 486 U.S. at 150.

Petitioners extrapolate from the words "actually have been decided," 486 U.S. at 148, the theory that *Chick Kam Choo* restricted the relitigation exception of the Anti-Injunction Act to *issue* preclusion cases only. Under their theory, a federal court that renders a final judgment has authority under The Anti-Injunction Act to enjoin relitigation of issues barred by issue preclusion, but not relitigation of claims barred by claim preclusion. Nothing in *Chick Kam Choo* expressly states this theory, and it contradicts this Court's express recognition that the relitigation exception to the Anti-Injunction Act "is founded in the well recognized concepts of *res judicata* and collateral estoppel," and allows an injunction of "*claims* or issues ... decided by the federal court." *Chick Kam Choo*, 486 U.S. at 147-48 (emphasis added).

B. General Discussion of Claim and Issue Preclusion Principles

The petitioners' argument confuses the doctrines of claim preclusion (sometimes called res judicata) and issue preclusion (sometimes called collateral estoppel). Briefly, the doctrine of claim preclusion provides that "a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." *Restatement (Second) Judgments* § 19. Claim preclusion does not apply to cases dismissed on grounds of forum non conveniens, however, such as *Chick Kam Choo*. This exception is stated in § 20 of the *Restatement (Second) Judgments*:

> (1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:
>
> (a) When the judgment is one of dismissal...for improper venue....

As the Comment to the *Restatement (Second) Judgments* explains:

> Ordinarily, after a judgment is rendered in an action, the claim is extinguished by the judgment's bar or merger effect, and therefore it is impossible to maintain a subsequent action on the claim. But there are exceptions. For example, when a judgment for the defendant is based on lack of jurisdiction, *improper venue*, or nonjoinder or misjoinder of parties, the plaintiff is not precluded from maintaining another action on the claim.

Restatement (Second) Judgments § 17, Comment c (emphasis added).

Issue preclusion, on the other hand, precludes relitigation of issues actually litigated:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) Judgments § 27. "Under the doctrine of collateral estoppel...the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co., Inc. v. Shore*, 439 U. S. 322, 326 n.5, 99

S.Ct. 645, 58 L.Ed.2d 552 (1979); *Montana v. United States*, 440 U.S. 147, 153 (1979).

While the rules of claim preclusion do *not* apply to cases like *Chick Kam Choo* dismissed on grounds of forum non conveniens, the rules of issue preclusion *do* apply. The Comment to *Restatement (Second) Judgments* § 20 makes this clear:

> The rules of issue preclusion (see §§ 27, 28) apply to a valid and final personal judgment for the defendant even though the judgment is one which, under this Section [listing exceptions to the general rule of claim preclusion], does not bar another action on the same claim.

The *Restatement* gives the following illustration:

> 1. A brings an action against B for personal injuries, and the action is dismissed for improper venue on the ground that the judicial district in which suit was brought was not the district of defendant's residence as required by law. Although A is not barred from maintaining an action on the claim in another district, the rules of issue preclusion are applicable to the determination that venue was improper in the initial action.

Restatement (Second) Judgments § 20, Illustration 1 at 171.

Thus, in *Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 71 (1963), this Court held that claim preclusion principles did not apply to a case dismissed by a state court on grounds of forum non conveniens. After the state court, located in Chicago, dismissed his case, the plaintiff brought a similar claim in the federal district court, also located in Chicago. The defendant argued that claim preclusion required the federal court to dismiss the federal case as well on forum non conveniens grounds. This Court held that different factual issues

were involved in the federal court's decision, and therefore "principles of res judicata are not applicable...." 375 U.S. at 73.

In *Mizokami Bros. of Arizona v. Mobay Chem. Corp.*, 660 F.2d 712 (8th Cir. 1981), the plaintiff's suit in the District of Arizona was dismissed against one defendant on forum non conveniens grounds. The plaintiff then refiled in the Western District of Missouri. The Eighth Circuit held that claim preclusion did not apply to the forum non conveniens dismissal:

> In the present case the applicable res judicata principle is issue preclusion. Because there has been no judgment on the merits of Mizokami's claim, a second action is not barred by the rules of claim preclusion. [citations omitted] The prior forum non conveniens dismissal precludes relitigation of only those issues of law and fact actually litigated and necessary to the [prior court's] decision.

660 F. 2d at 715 (emphasis added). Similarly, in *Chick Kam Choo* further litigation of issues actually litigated was barred by issue preclusion, there was no basis for claim preclusion.

C. The Present Case Does Not Conflict With *Chick Kam Choo*

With these principles in mind, the distinction between *Chick Kam Choo*, a case dismissed for forum non conveniens reasons, and the present case, a case litigated to final judgment over eighteen years, becomes apparent. In *Chick Kam Choo*, the district court's injunction was overbroad because the case had been dismissed on forum non conveniens grounds; thus, issue preclusion applied but not claim preclusion. The forum non conveniens dismissal in *Chick Kam Choo* "preclude[d] relitigation of only those issues of law and fact actually litigated and necessary to the [court's] decision." *Mizokami Bros. of Arizona v. Mobay Chemical Corp.*, 660 F.2d 712, 715 (8th Cir. 1981); *Restatement (Second) Judgments* § 20(1)(a).

The injunction approved by this Court in *Chick Kam Choo* went as far as the law of claim and issue preclusion allowed: litigation of the Singapore law *claim* was not barred by claim preclusion, but the choice of Singapore law *issue* was issue preclusion and could not be relitigated in the state court. In short, the district court's injunction in *Chick Kam Choo* was overbroad because it violated the principles of claim and issue preclusion; this Court did not hold, as petitioners suggest, that the relitigation exception is inapplicable in claim preclusion cases.

An entirely different situation is presented in the present case. The merits of the Ulloas' claims for MCS stock under the 1971 contracts were litigated to final judgment. Thus, their claim in the first Guam case, CV 1223-89, for more MCS stock based on the same 1971 contracts is barred by claim preclusion:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar...the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to *all or any part of that transaction, or series of connected transactions*, out of which the action arose.

Restatement (Second) Judgments, § 24(1) (emphasis added). "All breaches [of contract] occurring prior to commencement of the first action constitute part of a single claim or cause of action, even though each would have been pursued as a separate claim at the time it arose." 18 C. Wright & A. Miller, *Civil, Federal Practice and Procedure* § 4409 at 75 (1981).

The claim for MCS stock asserted by the Ulloas in their 1972 federal lawsuit is the same claim for MCS (now WSI) stock in the first 1989 Guam suit, CV 1223-89, even though in the federal cases they sought *rescission* of the 1971 contracts and now they claim *breach* of the same contracts:

> Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking

> the same or approximately the same relief but adducing a different substantive law premise or ground. This does not constitute the presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred.

Restatement (Second) Judgments § 25, comment d. at 212. Thus, claim preclusion prevents a plaintiff from suing first for rescission of a contract, losing, then suing for breach of the same contract, because the "claim" is the same. *See*, *Restatement (Second) Judgments*, § 25, comments h, j, k, and illustrations 23, 24, and 25. The final judgment on the merits "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceedings." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979); *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983). The federal cases conclusively decided the Ulloas' claim for MCS stock under any aspect of the 1971 transactions and any theory or cause of action. Because the Ulloas' 1972 federal lawsuit was decided on the merits, and was not dismissed for forum non conveniens reasons, the new Guam suit (CV 1223-89) for breach of the 1971 contracts raises "claims" that "actually have been decided by the federal court," *Chick Kam Choo*, 486 U.S. at 148, and were properly enjoined.

The second Guam suit, CV 1224-89, in which petitioner David Ulloa asks the Guam court to declare "null and void" a federal marshal's sale is a direct attack on the federal court and barred by claim and issue preclusion. He seeks relitigation in the Guam court of right to purchase MCS stock under the August 4, 1971 contract--a right that was sold in the marshal's sale ten years earlier. The April 12, 1979 sale was pursuant to an Alias Writ of Execution signed by the district court. 9th Cir. EOR at 354. The Writ was addressed from "THE GOVERNMENT OF THE UNITED STATES OF AMERICA to the United states Marshal for the District of Guam...." It commanded the marshal to satisfy the federal court's November 18, 1977 judgment by sale of David Ulloa's personal property. *Id.* The

sale of David Ulloa's contract rights was thereafter conducted by the federal marshal and reported back to the federal court. EOR at 354-360. The sale was conducted under the auspices of the federal court, by federal officials, as part of Western's enforcement of the federal court's judgment. Ulloa never objected to or appealed the sale. May 11, 1990 Order, Petitioners' appendix at 39a.

Fed.R.Civ.Proc. 69(a) authorizes a federal court to conduct "proceedings supplementary to and in aid of a judgment...and in aid of execution." Pursuant to Rule 69(a), "a federal court has authority to enforce its judgment and to conduct proceedings to aid execution of its judgment through a writ of execution." *Hankins v. Finnel*, 759 F.Supp. 569, 571 (W.D.Mo. 1991). Alleged errors in the execution of a federal judgment must be directed to the court that issued the judgment, or to the appropriate federal appeals court. *Riggs v. Johnson County*, 73 (6 Wall.) U.S. 166, 187, 18 L.Ed. 768 (1867).

A federal court may enjoin state court cases threatening title to property levied and sold by the federal court. *Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co.*, 198 U.S. 188, 202 (1905); *Julian v. Central Trust Co.*, 193 U.S. 93 (1904); *Hagan v. Lucas*, 96 U.S. 400, 402 (1836) ("The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other"). The Guam court has no power to grant David Ulloa's request to declare "null and void" the federal marshal's execution of the federal judgment, just as it has no power to void the underlying federal judgment itself. *Williams Natural Gas Co. v. Oklahoma City*, 890 F.2d 255, 264 (10th Cir. 1989).

To read *Chick Kam Choo* as the Ulloas suggest would substantially limit the finality of federal court judgments. Under their theory, a plaintiff's claim could be dismissed on the merits by a federal court for statute of limitations, laches, or other procedural grounds and the plaintiff could file again in state court. This result would contradict Fed. R. Civ. P. 41(b), which provides that such a dismissal normally operates as an adjudication upon the merits. *See e.g., Browning Debenture Holders' Comm. v. DASA Corp.*, 605 F.2d 35, 39 (2d Cir. 1978) (dismissal of federal case for failure to

post a bond was a dismissal on the merits and merited an injunction of a subsequent state court suit). Claims that should have been litigated in prior federal proceedings would be barred by claim preclusion if the plaintiff reasserted the claim in *federal* court, but would *not* be barred if the plaintiff reasserted the same claim in *state* court. The Ulloas accuse the respondents of forum shopping, but respondents merely returned to the same federal court that handled this case since 1972. It is the Ulloas who are forum shopping, filing suit in Guam court after losing eighteen years of litigation they started in the federal court.

Congress could have prohibited the federal courts from enjoining any state court proceedings. It has not. To the contrary, recognizing that prevailing federal parties deserve protection from repetitive litigation in the state courts, and the possibility of conflicting rulings, in 1948 Congress overruled *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), and amended the Anti-Injunction Act expressly to authorize the federal courts to enjoin attacks on final federal court judgments. *Mitchum v. Foster*, 407 U.S. 225, 236 (1972); *Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co.*, 542 F.2d 45 (7th Cir. 1976).

No plaintiff should get two chances at winning. No defendant should have to defend the same claim in two courts. The lesson of *Chick Kam Choo* is that when a case is dismissed for forum non conveniens reasons, there is no claim preclusion in *either* the federal or the local court. But where a case is decided on the merits in a federal court, whether or not every theory is addressed in the court's opinion, the plaintiff's claims are "actually decided" and further litigation in the local court may be enjoined.

In the present case, the Ulloas have had twenty years in the federal courts. The district court did not abuse its discretion in enjoining them. Thus, the holding of the Ninth Circuit in the present case conforms to the *Chick Kam Choo* decision.

III. Other Circuit Decisions Cited by the Petitioners Do Not Conflict With the Ninth Circuit's Opinion

The petitioners cite cases from five other Circuit Courts of Appeal allegedly in conflict with the Ninth Circuit's opinion. Petition at 3. Upon close examination, with the lone exception of *Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866 (5th Cir. 1991), these cases are distinguishable.

The first case cited by petitioners is *DeCosme v. Sea Containers, Ltd.*, 874 F.2d 66 (1st Cir. 1989). In *DeCosme*, a seaman was killed in a crane accident. The seaman's estate sued in federal court, and the case was consolidated with another case involving injured seamen. The workman's compensation insurance fund was a party to the wrongful death case, but not the injury case. Both cases were consolidated for trial. A settlement was reached to dismiss the cases, but did not include the fund as a signatory, nor was the fund mentioned in the final judgment. The fund's attorney signed a satisfaction of judgment under the impression it was for the wrongful death case only. The fund then sued in local court for reimbursement of claims paid in the injury case.

The First Circuit held that "there is a legitimate question whether either res judicata or collateral estoppel would apply" to the fund's suit to recover reimbursement paid in the injury case. 874 F.2d at 68. The court did not find a "strong and unequivocal showing of relitigation of the same issue." *Id.* The fund did not sign the settlement, was not mentioned in the final federal court judgment, and was not even a party to the injury case. The court's reluctance to bar the fund from litigating its reimbursement rights in the injury case is understandable. In the present case, the Ulloas were parties to both federal cases, litigated for eighteen years and lost.

The next case cited by petitioners, *In re G.S.F. Corp.*, 938 F.2d 1467 (1st Cir. 1991) actually agrees closely with the Ninth Circuit's opinion in the present case. In *In re G.S.F. Corp.*, two parties settled a property dispute pending in the bankruptcy court. One party then sued two years later in the state court. The First

Circuit held that the bankruptcy court was authorized to enjoin the state court suit because the federal court settlement encompassed all claims concerning the property, whether specifically mentioned in the settlement stipulation or not. 938 F.2d at 1467.

Next, the Ulloas cite *Staffer v. Bouchard Transp. Co., Inc.*, 878 F.2d 638 (2d Cir. 1989). In *Staffer*, an injured seaman recovered damages against his employer. The employer recovered contribution for almost the entire amount from a third-party defendant, a doctor. The seaman then sued the doctor directly in state court. The Second Circuit refused to enjoin the seaman's state court suit because his medical malpractice claim had not been litigated in the prior federal case. The claim decided by the federal court was only the contribution claim between the employer and the doctor; the seaman was not even a party to the contribution claim. Again, in the present case the Ulloas were parties to the federal litigation and their claim concerning the 1971 contracts, no matter what theories they advanced, were litigated on the merits.

In *Kidder Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F.2d 556 (2d Cir. 1991), a federal district court issued a declaratory judgment that the plaintiff was not liable under federal securities laws, then declined to exercise jurisdiction over pendent state law claims. Nevertheless, the court then enjoined the defendant from pursuing any claim, state or federal, arising from the stock transaction. The Second Circuit held that "the district court properly enjoined [the defendant] from relitigating the federal securities claims, 'no matter how denominated,' because those issues already had been decided." 925 F.2d 556. The injunction of state law claims was overbroad, however, because the district court had no pendent jurisdiction over such state law claims and its declaratory judgment did not decide them. *Id.* In the present case, in contrast, the district court had jurisdiction over all of the Ulloas' claims for MCS stock based on the 1971 contracts, and its final judgments were conclusive.

In *Nationwide Mut. Ins. Co. v. Burke*, 897 F.2d 734 (4th Cir. 1990), an insurer that had prevailed in a declaratory judgment action in federal court requested the federal court to enjoin a state court

from enforcing a settlement agreement the insurer had voluntarily made to settle a case in the state court. Recognizing that the "relitigation exception applies...when the federal judgment is claim preclusive," the Fourth Circuit nevertheless held that the federal court's coverage decision was "irrelevant to the state law issue of enforceability of the settlement agreement". 897 F.2d at 737-38. Similarly, in *LCS Servs., Inc. v. Hamrick*, 925 F.2d 745 (4th Cir. 1991), the Fourth Circuit concluded that a district court's injunction was overbroad "because no claim or issue pending in the state court actions has ever been decided by the United States District Court." 925 F.2d at 749. Likewise, in *American Town Center v. Hall 83 Assocs.*, 912 F.2d 104 (6th Cir. 1990), the court refused to require a district court to issue an injunction when "additional claims" were made in the state court proceeding. 912 F.2d at 112 n.2. In contrast, in the Guam suits here the Ulloas seek the same stock based on the same 1971 contracts at issue in the federal litigation, and hence the claim in the Guam suits is the same litigated in the federal court.

Thus, the "conflicting" cases cited by the Ulloas, with one exception, do not conflict with the Ninth Circuit's decision. These cases merely hold that a federal court cannot enjoin state court litigation of a claim or issue that is not barred by claim or issue preclusion. They do not hold, as petitioners suggest, that only issues barred by issue preclusion may be enjoined.

IV. The Ninth Circuit's Opinion Does Not Conflict With Other Circuits' Interpretation of *Younger v. Harris*

The Ulloas contend that the Ninth Circuit's opinion conflicts with *Lamb Enters., Inc. v. Kiroff*, 549 F.2d 1052 (6th Cir. 1977) and other cases because it refused to apply the "equitable restraint" doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) in this case. There is, however, no such conflict. In *Lamb Enters. v. Kiroff*, the Sixth Circuit specifically declined to rule on the issue here:

> The peculiar posture of this litigation takes the case out of the class of proceedings traditionally dealt with under the 'relitigation exception' to § 2283 .... We do not reach the question of whether the principles of *Younger-Huffman* should be applied in all situations involving § 2283 and the 'relitigation exception' thereto.

549 F.2d at 1062.

In its opinion the Ninth Circuit properly found that *Younger v. Harris* is inapplicable to the present case. First, "*Younger* abstention is required...only when state court proceedings are initiated *before* any proceedings of substance on the merits have taken place in the federal court." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 238, 104 S.Ct. 2321, 81 L.Ed.2d 186, 195 (1984) (emphasis added). Here, the Ulloas filed their Guam suits after almost eighteen years of litigation in the federal courts.

Second, the scope of *Younger*'s application outside of criminal cases is limited to "civil proceedings in which important state interests are involved," such as public nuisance statutes "in aid of and closely related to criminal statutes," *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), cases involving "the presence of such other vital concerns as enforcement of contempt proceedings," *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 l.Ed.2d 376 (1977), "or the vindication of important state policies such as safeguarding the fiscal integrity of [public assistance] programs." *Trainer v. Hernandez*, 431 U.S. 434, 444, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977). *See, Moore v. Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979). Here, the Ulloas' claim for MCS stock involves no substantial Guam government interests.

The Ulloas claim that "Guam's interest in this case is far superior to that of the federal court" because their claims rest on Guam law. Although when the Ulloas first filed suit in 1972 the district court had expanded jurisdiction over certain non-diversity cases, the district court is a federal court "created by the laws of the United States." *Camacho v. Civil Serv. Comm.*, 666 F.2d 1257,

1261 (9th Cir. 1982) (describing analogous Commonwealth of the Northern Marianas district court). It is not a Guam court, and its judgments are not Guam court judgments. Moreover, the preclusive effect of a judgment of the federal district court or the Ninth Circuit is governed by federal, not local, law. *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129 n.1 (1941); *Restatement (Second) Judgments* § 18, Comment k, and § 87. It is difficult to see what interest the government of Guam has in protracting the Ulloas' bad faith litigation.

Nor is the threat of irreparable injury absent in this case. "If 'the federal litigation has been unusually burdensome or protracted,' further litigation may cause irreparable harm to the prevailing party, already denied long-awaited repose." *Zagano v. Fordham Univ.*, 720 F.Supp. 266, 268 (S.D.N.Y. 1989), *quoting in part Browning Debenture Holders' Comm. v. DASA Corp.*, 454 F.Supp. 88, 101 (S.D.N.Y.), *aff'd*, 605 F.2d 35 (2d Cir. 1978); *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 759 F.Supp. 1216, 1237 (N.D.Tex. 1990) ("the irreparable injury facing Royal is the compromise or nullification of the Court's September 8, 1989 Judgment and the Court's ability to adjudicate the present controversy"). The option of relying entirely on the Guam court to uphold the res judicata effect of the federal court judgment does not, as petitioners suggest, eliminate the threat of irreparable harm. As the Second Circuit held in a very similar case:

> In a case such as this it would be a disservice not only to the defendants, but also to the state judiciary, to allow the entire record to be placed in the lap of the New York State courts to be argued over by lawyers and puzzled over by judges for years to come. While comity requires respect for the ability of the state courts to decide the issue of res judicata properly, it also requires sympathy for their calendar problems and for the task that would confront them were this litigation to be imposed upon them.

Browning Debenture Holders' Comm. v. DASA Corp., 605 F. 2d at 40.

Third, "*Younger*...do[es] of course allow intervention in those cases where the district court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith." *Huffman v. Pursue, Ltd.*, 420 U.S. at 611; 17 C. Wright, A. Miller, & E. Cooper, *Civil, Federal Practice and Procedure*, § 4226 at 552 ("There is no difficulty in justifying an injunction against relitigation if there is a showing of bad faith, multiplicity of suits, or other evidence of harassment"). Here, the district court indeed found that "the suits had no merit whatsoever, and were obviously filed for harassment." May 11, 1990 Order, Petitioners' appendix at 52a. The Ninth Circuit affirmed "the award of sanctions," remanding only for a rehearing of "the amount of the sanction." 958 F.2d at 866.

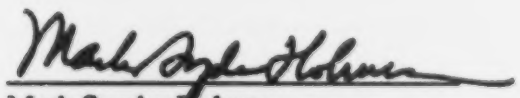
Accordingly, for the reasons stated above, the Ninth Circuit's opinion does not conflict with *Younger v. Harris* or *Lamb Enters., Inc. v. Kiroff*.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Dated: December 14, 1992



Mark Snyder Holmes
Counsel of Record for
Respondents Western Systems, Inc.
and Lee M. Holmes

IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

ALBERT THOMAS CRUZ, CEZI CRUZ, PATRICIA C. CRUZ, RICHARD G. CRUZ, FRANCES M. GUNN, LARRY E. GUNN, ROBERT E. HALSEY, JOHN M. HALSEY, FRANK V. OKIYAMA, MARIE B. OKIYAMA, JOHNNY GUEVARA SABLAN, BARBARA P. SARMIENTO, HERMAN B. SARMIENTO, DAVID J. ULLOA, JUANITA S. ULLOA, and RICHARD F. ULLOA, Plaintiffs, vs. GUAM ECONOMIC DEVELOPMENT AUTHORITY, a public corporation, and LEE M. HOLMES, Defendants.	CIVIL CASE NO. 24-72 OPINION

On February 28, 1972, plaintiffs filed the complaint in this action to enforce a constructive trust (Count I) and for damages (Count II). It was determined at the pretrial conference conducted on June 9, 1972, that the trial would be limited to Count I, namely the enforcement of a constructive trust.

Plaintiffs are the former stockholders of Marianas Communications Systems, Inc., hereinafter referred to as "MCS." Defendant Guam Economic Development Authority, hereinafter referred to as "GEDA", is a public corporation and was originally the guarantor of MCS, subsequently the sole stockholder of MCS, and is presently a minority stockholder of MCS. Defendant Lee Holmes in presently the largest single stockholder of MCS.

The action was filed by sixteen original shareholders of MCS. However, over the course of this case, ten (10) of the original plaintiffs and their claims were dismissed. The remaining plaintiffs are David J. Ulloa, Richard F. Ulloa, Richard G. Cruz, Robert E. Halsey, Joan M. Halsey, and Johnny Guevara Sablan.

HISTORY OF MCS

MCS was incorporated in 1968 by David J. Ulloa, Frank V. Okiyama, Richard G. Cruz, and Richard F. Ulloa and had a purported capital of $10,000 with 1,000 shares of stock issued at a par value of $10.00 a share. The purpose of the company was to establish a cable television system in the Territory of Guam.

In 1969, the four original stockholders conferred with GEDA personnel with regard to obtaining a loan from GEDA, or a GEDA guarantee, if the company could secure a bank loan. The amount of the loan or guarantee requested was $200,000.

Later in 1969, the authorized shares of stock were increased to 30,000 shares with a purported capital value of $300,000. The original four shareholders subscribed to an additional 23,000 shares. First National City Bank, hereinafter referred to as "FNCB", approved a $200,000 GEDA-guaranteed loan to MCS in 1970. At the time, the original four shareholders indicated on the corporate books that the $230,000 worth of stock that had been subscribed to was paid in full in exchange for the efforts expended in obtaining the loan. No cash or property was ever paid for the 23,000 shares issued.

In the middle of 1970, MCS started receiving the money and by April or may of 1971 the $200,000 from the loan had been spent and MCS had incurred additional outstanding bills totaling close to $221,000. At this time, the company was indisputedly in grave financial trouble and was insolvent. In April of 1971, MCS had approximately 550 subscribers and thirty-five miles of cable installed. The company was experiencing technical problems with the quality of its televisions tapes and was hampered by an insufficient supply of programs. In order for the company to break even on its operation, it would be necessary to increase subscribers up to 2,500. In short, as of April 1971, the company was losing large sums of money per month on its operation and had no prospects of obtaining further financing for the desperately needed capital improvements. As a consequence, buyers were sought for the company. While at least one company expressed interest in purchasing MCS, and even obtained an option to purchase, it declined to exercise its option.

As of May 11, 1971, it became obvious that MCS would be forced to shut down its operation. The consensus of opinion among the members of the GEDA Board was that the liquidation value of MCS's assets was negligible.

At a Board of Directors meeting of GEDA on May 11, 1971, the Board decided it had two alternatives: One, to pay off its obligation to FNCB of $200,000 and let MCS go bankrupt or Two, to take over the stock of MCS and further finance its operation at a loss until GEDA could find somebody else to take over the company. At this meeting, the GEDA Board voted to take over MCS wholeheartedly and to provide the amount of money necessary to turn the company into a successful operation.

FACTS OF THE CASE

On May 21, 1971, Mr. James Halliday, Administrator for GEDA, entered into two agreements with all of the shareholders of MCS and their spouses. These agreements were entitled "Stock Purchase Agreement" and "Agreement". The primary issues in this litigation involve these two agreements as well as an agreement executed July 20, 1971 by most of the original shareholders of MCS and GEDA.

By the terms of the May 21, 1971 agreements, the original shareholders of MCS sold their shares in MCS to GEDA for the price of $1.00 per shareholder, regardless of the number of shares owned by the particular shareholder.

In the agreement, the original shareholders represented to GEDA that all of the shares issued previously and turned over to GEDA were lawful, and that the company was duly organized and in good standing under the laws of Guam.

Section 6 of the agreement, entitled Right of First Refusal, provided that GEDA would not transfer the shares of stock without first permitting the former shareholders an opportunity to repurchase all of the shares. However, this right to repurchase was conditional in two respects. First, that the purchase price for the original shareholders must be equal to the total amount expended by GEDA, the payment of all debts and liabilities incurred in the operation of the company and the removal of all guarantees made by GEDA, plus a reasonable service fee. If the former shareholders failed to exercise their option to repurchase within 30 days, then GEDA would be free

to "transfer, alienate, or otherwise dispose of such shares without restriction." As of May, 1971, the purchase price would equal approximately $421,000 plus a reasonable service fee. MCS owed $200,000 to FNCB on a loan for which GEDA was the guarantor, and MCS also had another $221,000 in accounts payable.

The right to repurchase was conditioned further by the following clause in Paragraph 6:

> "This right of first refusal is not an individual right to a shareholder to reacquire the shares transferred by that individual stockholder by this agreement or any other shares. The right of first refusal is a collective right and all shares offered for sale by GEDA must be acquired under the same terms and conditions as set forth in the preceding paragraph."

In addition to the "Stock Purchase Agreement", Halliday and all the stockholders of MCS and their spouses signed another document, labeled "Agreement" on May 21, 1971 and annexed the "Stock Purchase Agreement" to the "Agreement". Paragraph 2 of the agreement provided:

> "Notwithstanding the provisions of Section 6 set forth in the Stock Purchase Agreement annexed hereto, GEDA further agrees that it shall not offer for sale any of the shares within one hundred eighty (180) days from the date of this agreement."

This supplemental "Agreement" was not shown to, nor approved by, the GEDA Board.

Admitted into evidence are transcripts of tape recordings made of meetings of the GEDA Board of Directors held on May 11, May 17, May 28, July 11, July 14, July 20, August 2, August 3, and September 1, 1971. While the transcripts have some blank spaces, and it is not possible to identify the people speaking in some instances due to poor recording quality, the transcripts are by and large an accurate, record of what transpired at the board meetings.

Also admitted into evidence are the minutes of meetings of the GEDA Board of Directors held on May 11, July 14, July 20, August 2, August 3, and September 1, 1971 and March 1, 1972.

Subsequent to the May 21, 1971 agreements, GEDA operated MCS with the assistance of the former employees, namely, David

Ulloa, Larry Gunn, and Albert Cruz. The company continued to incur large operational losses of around $15,000 a month, all of which was absorbed by GEDA. By the middle of July, the GEDA Board did not believe that GEDA could afford to subsidize the operations of MCS any longer without possibly causing the bankruptcy of GEDA.

At this point in time, Holmes entered into the picture after having been asked by James Halliday, then Administrator of GEDA, if he would be interested in purchasing MCS.

On July 14, 1971, the GEDA Board held a special informal meeting for the purpose of hearing a proposal from Holmes. Holmes proposed that GEDA turn 851 of the MCS stock back to the MCS Treasury, and that 70% of the stock (21,000 shares) be sold to Holmes for $2.00 a share or $42,000, that 10% of the stock (3,000 shares) be sold to the original shareholders on a pro-rata basis for $1.00 a share ($1,000) and that 5% of the stock (1,500 shares) be sold to David Ulloa, Larry Gunn and Albert Cruz, the three officers of the corporation, who have been and will continue to be active in management, for $1.00 per share. Note, according to this proposal, GEDA will hold on to 15% of the stock. Albert Cruz and David Ulloa were present at this meeting and assisted in the Holmes' presentation. It is important to note at this time that David Ulloa was the general manager of MCS and prior to May 21, 1971 was the majority stockholder of MCS, owning 15,500 of the 30,000 outstanding shares.

Holmes' proposal also called for the addition of $100,000 into MCS obtained from more loans, principally an additional $50,000 loan from FNCB and an additional $50,000 loan from GEDA.

The reaction of the GEDA Board was indeed favorable to the Holmes' proposal as is apparent from the transcripts of the meeting. After Holmes left the meeting, Director Ord stated, "This is the best offer of a way out we've ever had". Director Wharton stated, "It's probably the only one we're going to get for this company". Director Perry stated, "If we don't do something, we'll lose the whole works, though."

It was at this point that the GEDA Board of Directors discovered that Mr. Halliday had signed the supplemental agreement on May 21, 1971, which prohibited GEDA from offering the shares for sale for six months. Although the GEDA Board questioned the validity of the supplemental agreement since it was signed by the Administrator without knowledge of the board, it was decided that a

round table discussion should be held between the original MCS shareholders and the GEDA Board in order to obtain the waiver of the original shareholders' right of First Refusal in exchange for the benefits of the Holmes' proposal.

On May 28, 1971, the GEDA Board of Directors held a regular GEDA Board meeting. It appears from the transcript of that meeting that the members of the GEDA Board agreed that they would become the directors of MCS since MCS was wholly owned by GEDA. It then appears from the transcript that the GEDA Board Meeting was adjourned and an MCS Board of Directors meeting was convened. The Directors of MCS then elected James Halliday, President, Joe Perez, Vice-President, and Joe Cepeda, Secretary-Treasurer. Messrs. Halliday, Perez and Cepeda were all employees of GEDA.

On July 20, 1971, the three members of the MCS Board of Directors met in a round table meeting with five of the former stockholders of MCS, David Ulloa, Johnny Sablan, Robert Halsey, Larry Gunn, and Albert Cruz. David Ulloa was at all times also acting as a representative for his brother, Richard Ulloa. The three members of the MCS Board present were Guy Wharton, Roy Benito and Gerald Perry. All three were also members of the GEDA Board of Directors. While the minutes of the meeting were labeled as minutes of the Guam Economic Development Authority, the transcript of the meeting reveals that the meeting was opened by the Secretary as follows:

> "Round table meeting between the MCS Board of Directors and MCS stockholders regarding possible purchase of MCS stock by Technical Resources, Mr. Lee Holmes, Jenny Manufacturing, July 20, 10:00 A.M."

The transcript and Minutes of the July 20, 1971 meeting reflect that the former shareholders of MCS led by David Ulloa objected to certain parts of the Holmes' proposal.
Their objections to the proposal were as follows:

1. The former shareholders wanted to buy back 30% of the stock.

2 . They wanted to buy back the stock for one dollar per shareholder rather than one dollar per share.

3. They wanted it made a condition to the waiver agreement that Holmes would obtain the necessary loan from FNCB.

After a long discussion, Holmes, the MCS Board members and the five former stockholders present finally agreed to the terms of the July 20, 1971 agreement which was introduced into evidence. In the agreement, the former shareholders gave up their right of first refusal on the condition that within a reasonable time a contract would be executed among GEDA, MCS, and Holmes and that such a contract would include the following provisions:

> "a). Fifteen (15%) percent of the outstanding shares of MCS shall be made available for sale to the present Stockholders for the gum of ONE ($1.00) DOLLAR per share, and in such proportion as is the present stow, ownership of the said Stockholders.
>
> b). Fifteen (15%) percent of the outstanding shares of MCS shall be retained by GEDA and shall be made available for sale, for the sum of FOUR ($4.00) DOLLARS per share, to the following Stockholders, in equal proportions: DAVID J. ULLOA, ALBERT THOMAS CRUZ, and LARRY E. GUNN, JOHNNIE SABLAN, and LEE M. HOLMES, when the debt owed GEDA by MCS is repaid in full."

If the contract between Holmes, GEDA, and MCS was not executed within 60 days from July 20, 1971, then the former stockholders could cancel the July 20, 1971 agreement with notice by the stockholders in writing to GEDA and Holmes.

This agreement was signed by Guy Wharton on behalf of GEDA and by all of the plaintiffs, with the exceptions of Richard Cruz, Robert Halsey, and Joan Halsey. Lee Holmes signed "agreed" on the second page of the agreement.

The transcript of this meeting reveals that the former shareholders, especially, David Ulloa, wanted to include in the agreement a condition that Holmes would obtain a loan from FNCB, with which to make the further capital improvements which would bring MCS up to the breakeven point. Holmes represented to the former shareholders that if GEDA would loan another $50,000 and the shareholders would contribute $46,500 in equity financing by purchasing the stock then FNCB would probably match those amounts with a loan. However, Holmes made the representation that

FNCB's attitude was favorable, but that it would not commit itself to such an arrangement at this time. Holmes further represented that a commitment from the bank was interrelated to a lot of things, and that if FNCB would not grant the loan, he would either raise the money elsewhere or would call off the whole deal. In that event, the waiver could be cancelled. At this point in the meeting, any discussion of requiring Holmes to produce a loan from FNCB as a part of the agreement ceased.

The former shareholders who agreed to the July 20, 1971 agreement represented 26,200 shares of the 30,000 shares outstanding an of May 21, 1971. The only former shareholders who did not sign the July 20, 1971 agreement were Richard Cruz and Robert and Joan Halsey representing 3,800 shares.

The question arose during the meeting as to the legal consequences if some of the former shareholders did not sign the agreement. Assistant Attorney General Charles Troutman was asked his opinion on the subject, and he replied both at the meeting and on July 29, 1971 with a written opinion. Troutman took the position that the former shareholders' right of refusal under the May 21, 1971 agreements was a collective right and not an individual right.

Troutman's opinion stated in part:

> "It is my interpretation of this collective right that the former shareholders may agree among themselves as to what method they will use to determine if they, as a group will repurchase the shares or fail to do so. Therefore, the group may determine that the decision is by a physical majority of the group, or a majority of shares formerly held, and that if the group decides to grant a waiver on the right of repurchase, it may do so with recourse to a majority decision.
>
> "Further, an individual has no right to repurchase independent from the group decision. As a result, the individual's signature on the original agreements, or on any subsequent agreement or waiver thereof operates only as one of a group, rather than as an individual. The effect of the original signatures is merely that the decision of the group was unanimous, and any waiver of the 180-day period would require the signatures to have the same effect, that of members of a group which may or may not be unanimous.

"Therefore, the group of former stockholders may decide that as a group they will abrogate the original 180-day plan, and any dissenting member may complain only against the group's decision, not against GEDA for acting upon that decision."

On August 4, 1971, Holmes, GEDA, and MCS executed a contract called "Agreement for Sale of MCS Stock", the terms of which required GEDA to sell 26,500 shares of MCS stock to the MCS Treasury for the sum of $1. Holmes was required to buy 21,000 shares of MCS stock from MCS for the price of $42,000. The provisions agreed upon in the July 20, 1971 agreement were included in the August 4, 1971 agreement.

Attached to the August 4, 1971 "Agreement for Sale of MCS Stock" is Exhibit A, the July 21, 1971 "Stock Purchase Agreement", Exhibit B, the May 21, 1971 supplemental "Agreement", and Exhibit D, the July 20, 1971 "Agreement". In Section 5 of the August 4, 1971 "Agreement for Sale of MCS Stock", GEDA specifically represents to Holmes that the July 20, 1971 agreement was made for the purpose of freeing all of the said shares of MCS stock from the "Right of First Refusal" held by the former shareholders. GEDA further warranted the legality of the July 20, 1971 "Agreement" to Holmes.

The August 4, 1971 "Agreement for Sale of MCS Stock" was signed by Jesus S. L. Guerrero, Chairman of the Board of Directors of GEDA, James C. Halliday, President of MCS, and Holmes. The agreement was witnessed by David Ulloa and Joe Perez.

David Ulloa, Richard Ulloa, and Johnny Sablan exercised their rights to purchase MCS shares under the August 4, 1971 agreement. Defendant's Exhibit GG is a series of letters and installment notes relating to the shares in question. Johnny Sablan and David Ulloa both signed installment notes in exchange for their proportion of MCS shares. While the record does not reflect whether Richard Ulloa executed installment notes, it does reflect that he paid for his proportionate number of shares in September 1971. Herman Sarmiento also purchased his proportionate number of shares on September 20, 1971.

It is also apparent from the evidence that Richard Cruz sometime in August of 1971 purchased the right of Robert and Joan Halsey to purchase any MCS shares. At the time of the August 4, 1971 agreement, Richard Cruz, who at one time was an employee of MCS, was not an employee of MCS and had not been employed by

MCS for quite some time. It is also apparent that Richard Cruz did not play a substantial part in the negotiations with GEDA and Holmes relating to the July 20, 1971 agreement and the August 4, 1971 agreement.

Defendants' Exhibit CC-1-6 consists of a series of letters and notes relating to the purchase of MCS stock by Richard Cruz. On August 10, 1971, Larry Gunn, Secretary of MCS, wrote a letter to Richard Cruz reminding him that on July 30, 1971, he had indicated to Lee Holmes and David Ulloa that he intended to purchase his proportion of MCS shares. Gunn requests Cruz to either purchase his shares, if necessary on the installment basis, by August 13, 1971 or indicate his desire to relinquish his right to purchase the shares in writing.

Cruz replied to Gunn's letter on August 13, 1971 and informed Gunn that he would let him know of his decision by September 2, 1971.

On September 9, 1971, Gunn again wrote Cruz and requested him to notify Gunn within 15 days of the method of payment he desired to make for his 570 MCS shares. (Cruz was allowed to purchase his rightful amount of 525 and Halsey's amount of 45).

On October 5, 1971, Lee Holmes, Chairman of MCS, wrote a letter to Cruz calling to Cruz's attention that he had not made payment or offered to make payment for his MCS stock, and, therefore, MCS had no recourse but to dispose of the stocks.

On October 8, 1971, Richard Cruz signed an installment note for the purchase of 570 MCS shares to be paid in full not later than October 13, 1971. On October 13, 1971, Cruz did pay MCS $570.

However, Plaintiffs' Exhibit 17 is a copy of a memorandum from Richard Cruz to MCS and is dated October 13, 1971. The memorandum is signed by Richard Cruz, and receipt of the memorandum is acknowledged by David Ulloa as President of MCS. The memorandum states as follows:

> "Please be advise that my payment this date of $570.00, in cash, for MCS shares is not in anyway an indication of my acceptance of the sales agreement to Lee Holmes.

Furthermore, I do not agree with the Holmes-Geda sales agreement nor did I waive my rights under the May 21, 1971 Agreement."

It is the testimony of Richard Cruz that he purchased the 570 shares under protest of the Holmes-GEDA agreement of August 4, 1971 and specifically did not waive his right under the May 21, 1971 agreement.

It is the testimony of Lee Holmes that subsequent to October 13, 1971, he had a telephone conversation with David Ulloa in which he specifically asked Ulloa if Cruz had purchased his MCS shares. According to Holmes, Ulloa informed him that indeed Cruz had paid for the shares, but Ulloa did not say anything to Holmes about the conditional nature of the payment or of Cruz's insistence that he was not waiving his rights under the May 21, 1971 agreement.

Holmes also testified that when he returned to Guam as Chairman of MCS, he was unable to locate the memorandum or any mention of it in the MCS files.

David Ulloa, Richard Ulloa, and Johnny Sablan continued in the active management of the company along with Holmes after August 4, 1971.

Soon after August 4, 1971, FNCB turned down Holmes' request for a loan subject to reconsideration at a later time. By November 1971, additional funds were provided by Holmes in the form of preferred shares and warrants raising an additional $118,000.

On December 16, 1971, the Columbia Broadcasting System, Inc., filed a complaint for Infringement of Copyright and Unfair Competition in the U. S. District Court, Central District of California, against MCS and the Ulloas. The suit was resolved by Holmes.

In January of 1972, another $59,000 was provided in equity capital and by February 28, 1972, approximately 52 miles of cable was in operation and approximately 2,430 subscribers were connected. In short, MCS's prospects for success were far greater on February 28, 1972 than on August 4, 1971. As of the date of trial, MCS was servicing 12,125 subscribers and had installed 270 miles of cable.

CONCLUSIONS OF LAW

On February 28, 1972, the plaintiffs in this case filed their complaint.

On November 13, 1972, this court granted defendants' motion to disqualify counsel for the plaintiffs. That decision was appealed and was affirmed by the Ninth Circuit Court of Appeals on March 21, 1974.

On October 22, 1975, six days before trial, counsel for plaintiffs filed a motion with the court to amend the Second Amended Pretrial Order and any other necessary pleadings in order to incorporate the issue of fraud into the case.

Count I of plaintiffs' complaint alleges that GEDA breached the May 21, 1971 agreement by failing to first offer the 21,000 MCS shares now held by Holmes to plaintiffs, that Holmes knew of this failure, that defendants acted in bad faith, and that the plaintiffs were ready, willing and able to perform the terms of the said agreements. Therefore, plaintiffs demand that the court enforce a constructive trust on the shares in question.

Count II of the complaint demanded damages but is not a subject of this trial.

Plaintiffs contended in their motion to amend that evidence supported an allegation not made in the complaint, namely, that GEDA and Holmes fraudulently induced all of the plaintiffs who executed the July 20, 1971 agreement, by which they waived their right of first refusal, to sign said agreement based on the promise from GEDA and Holmes that no contract would be executed transferring MCS shares from GEDA to Holmes, unless a bank commitment existed to lend MCS a dollar for each dollar advanced by Holmes, the plaintiffs, and GEDA. Plaintiffs furthermore contend that between July 20, 1971 and August 4, 1971, Holmes fraudulently represented to plaintiffs that FNCB had made a commitment to loan MCS $50,000 when in fact such representation was untrue.

The court denied plaintiffs' motion to amend the pleadings on the ground that the motion was untimely and prejudicial to the defendants and was not supported by the evidence.

JULY 20, 1971 AGREEMENT IS VALID

On October 21, 1975, plaintiffs filed a motion for summary judgment respecting the legal effect of the July 20, 1971 agreement, and a motion to amend the pleadings to whatever extent was necessary to hear evidence pertaining to adjudicating the issues concerning the legality of the July 20, 1971 agreement.

It is plaintiffs' contention that the July 20, 1971 agreement, wherein most of the former shareholders waived their right of first refusal, was an invalid agreement and is void and of no effect since the agreement was signed by Guy Wharton, as Acting Chairman of its Board of Directors of GEDA, at a meeting attended by only three (3) out of the seven (7) directors.

Section 53554 of the Government Code of Guam provides:

> "Section 53554. Board of Directors.
> All functions and powers of the Corporation shall be vested in and be exercised by and under the direction of a Board of Directors hereinafter referred to as the Board, composed of seven (7) members, appointed by the Governor of Guam with the advice and consent of the Guam Legislature. Members of the Board shall serve for a term of four (4) years. The Governor shall appoint a member of the Board to serve as Chairman."

Section 53558(c) of the Government Code provides that a majority of the GEDA Board shall constitute a majority for the transaction of business.

It is plaintiffs' contention that the GEDA Board, due to the lack of a quorum, had no authority to act on July 20, 1971. Consequently, the action it took, i.e., Guy Wharton signed the agreement, is void and of no effect.

It is undisputed that only three (3) members of the GEDA Board were present at the meeting on July 20, 1971. However, it is apparent from the transcript of the meeting that the meeting was a meeting of the Board of Directors of MCS and not a GEDA Board meeting. Moreover, the purpose of the meeting was to have a round table discussion with the former stockholders of MCS. The MCS Board presented the shareholders with Holmes' proposal. The former shareholders presented the Board with a counter-proposal.

The counter-proposal differed basically from the Holmes' proposal in the respect that the counter-proposal called for an immediate pro-rata sale of shares to the former shareholders of 154 and a later sale from GEDA to David Ulloa, Albert Cruz, Larry Gunn, Johnny Sablan, and Lee Holmes of 15% when the loans from GEDA to MCS were paid in full.

The transcript reflects a series of negotiations. Finally, Guy Wharton, Acting Chairman of the GEDA Board, stated that he did not have the authority to agree to the former shareholders' counter-proposal since a quorum was not present. However, he stated that Director Vicente Benavente was on island and had stated to him that if his vote were needed to contact him. Wharton directed one of the GEDA employees to find Benavente and obtain his approval of the agreement. Benavente was contacted and did initial the agreement.

If the July 20, 1971 meeting were to be construed as a GEDA Board meeting, it is undisputed that a quorum of the GEDA Board was not present on July 20, 1971. Nevertheless, the agreement signed on July 20 was not a bilateral contract. GEDA was not obligated to do anything under the terms of the agreement. In essence, the former shareholders were granting GEDA the option to sell the MCS shares, subject to the conditions outlined, unhindered by their right of first refusal. If at the end of sixty (60) days, GEDA had not exercised the option, then the option would lapse at the command of the former shareholders. GEDA was not obligated to any course of action by the July 20, 1971 agreement.

An offer which is to be kept open for a certain time or a proposal made to be accepted within a specified time, is a continuing offer. It is the view of some authorities that an option consists of two elements: One, the offer to perform a certain act, which is an uncompleted contract until it is accepted; and the other, the agreement to give the optionee a certain time within which to exercise his option of accepting. Some authorities even take the view that an option so long as it remains unaccepted, is a unilateral writing lacking the mutual elements of a contract, but when accepted by the optionee an executory contract arises, mutually binding upon the parties. 17 Am.Jur.2d, 370, §32. Crane-Rankin Development Co. v. Duke, 90 P.2d 883 (S.Ct. Okla. 1939).

Conceptually speaking, the July 20th agreement was merely a continuing offer made by the former shareholders to GEDA. GEDA accepted the offer on August 4, 1971 by signing a contract with Lee

Holmes within the scope of the option. The act of the GEDA Board which the former shareholders claim is invalid is not an act committed on July 20, 1971, for the GEDA Board committed no act on July 20, 1971. The act performed by the GEDA Board on August 4, 1971, i.e. the execution of the Agreement for Sale of MCS Stock, is the act of which the plaintiffs complain. Yet, it is undisputed that the execution of the August 4, 1971 agreement was validly approved by a quorum of the GEDA Board at a duly held Special Meeting of the Board of Directors of GEDA on August 3, 1971.

Even if it could be held that the July 20, 1971 agreement was a contract illegally and invalidly executed by GEDA, the evidence supports a conclusion that the agreement was duly ratified by the GEDA Board on August 3, at the time the Board considered and approved each and every paragraph in the August 4, 1971 agreement.

A Municipal Corporation may ratify and thus make binding an otherwise invalid contract.

> "Generally, a governmental body may effectively ratify what it could theretofore have lawfully authorized. Ratification after the act is said to be as potent as authority before the act. Irregular and, void acts may be ratified or confirmed at a subsequent meeting, provided it is a valid or legal meeting. Thus, where the action in allowing a claim is invalid because of a lack of a majority vote as required by law, it may be ratified at a subsequent meeting by resolution confirming such previous action." 4 McQuillen, Municipal Corporations (1968 Ed.) § 13.47.

> "It is a general rule that whatever acts public officials may do or authorize to be done in the first instance may subsequently be adopted or ratified by them with the same effect as though properly done under previous authority." McQuillen, Municipal Corporations, Third Ed., § 29.104, Vol. 10, 420.

In the context of a contract approved at a meeting subject to a procedural infirmity, 56 Am.Jur.2d, Municipal Corporations § 158, p. 212. notes:

> "Even though all members of the council are not notified of a special meeting, the proceedings at the meeting, which are not ultra vires, are validated by a ratification, understandingly done, at a subsequent regular meeting."

It is undisputed that GEDA had the authority to enter into the July 20, 1971 agreement and that such action was not an ultra vires act. Certainly, Section 53553 of the Government Code of Guam provides GEDA such authority:

> "Section 53553. General powers; termination date. The Corporation shall have, and may exercise, the following general powers in carrying on the activities specified in § 53552 of this Chapter:
>
> (a) ....
>
> (b) ....
>
> (c) ....
>
> (d) ....
>
> (e) ....
>
> (f) To acquire, in any lawful manner, any property -- real, personal, or mixed, tangible or intangible, and to hold, maintain, use, and operate the same; and to sell, lease, encumber or otherwise dispose of the same, whenever any of the foregoing transactions are deemed necessary or appropriate to the conduct of the activities authorized by this Chapter, and on such terms as may be prescribed by the Corporation.
>
> (g) To enter into and perform such contracts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with any state, territory, or possession, or any political subdivision thereof, or with any person, firm, association or corporation, as may be deemed necessary or appropriate to the conduct of the activities authorized by this Chapter, and on such terms as may be prescribed by the Corporation.
>
> (h) To execute all instruments necessary or appropriate in the exercise of any of its functions.
>
> ...."

It is not even necessary for a board of a Municipal Corporation to specifically ratify a previously invalidly performed act. A ratification can be done by implication. State v. District Court of Hennepin Co., 33 Minn. 235, 22 N.W. 625 (1885). In fact, ratification may be accomplished by some affirmative action by proper officers, inaction, mere silence, acquiescence, acceptance of the contract, or failure of the public corporation to object. See 10 McQuillen, Municipal Corporations, § 29.106.

There can be no doubt that even if the GEDA Board took some action on July 20, 1971 without the approval of a quorum, it was within the power of the Board to subsequently ratify that action and that the Board did properly ratify that act on August 4, 1971. In Paragraph 5 of the August 4, 1971 agreement, GEDA incorporated the July 20 agreement as Exhibit "D" and specifically warrants to Holmes the legality of that agreement.

Plaintiffs have presented public policy arguments as to why the July 20, 1971 agreement should be found to be invalid. The public policy arguments have no merit. GEDA obligated itself to do nothing by the July 20 agreement, and in no way could it or the Government of Guam or the public be affected detrimentally.

The former shareholders who signed the July 20, 1971 agreement signed the agreement with knowledge of the consequences and in an above board and open atmosphere, and by so doing waived their right of first refusal under the May 21, 1971 agreements and cannot now complain that they were not given the opportunity to exercise such right. In short, Plaintiffs David Ulloa, Richard Ulloa, and Johnny Sablan have no right to enforce.

RIGHT OF FIRST REFUSAL IS COLLECTIVE

Plaintiffs Richard Cruz, Joan Halsey and Robert Halsey did not, however, agree to or sign the July 20, 1971 agreement.

The depositions of Robert Halsey and Joan Halsey show that on May 21, 1971, they sold their 300 shares of MCS stock, owned jointly by them, to GEDA. On August 1, 1971, the Halseys sold their 300 shares of stock to Richard Cruz for $3,000. Although Mr. Halsey was of the impression that he sold his stock to Cruz, he didn't actually own any shares on August 1, 1971. What he sold to Cruz were his

rights under the May 21, 1971 agreement. Whatever rights the Halseys' have in this case and under the contracts in question are clearly now possessed by Richard Cruz and have been in the possession of Richard Cruz beginning August 1, 1971.

The question crucial to Cruz's position is, "Did he still possess a right of first refusal in spite of the fact that the other former shareholders signed the July 20, 1971 Agreement?"

The last two sentences in Section 6 of the May 21, 1971 Stock Purchase Agreement are most pertinent to this issue:

> "Sec. 6. .... This right of first refusal is not an individual right to a shareholder to reacquire the shares transferred by that individual stockholder by this agreement or any other shares. The right of first refusal is a collective right and all shares offered for sale by GEDA must be acquired under the same terms and conditions as set forth in the preceding paragraph."

The term "collective right" is all important to the meaning of this section. Unfortunately, the Court and the counsel in this action have found no cases or treatises involving the use of this term or interpreting this term. The words themselves are ambiguous, and it is difficult to establish from the section itself what the parties intended the words to mean.

Agreements containing obscure, imperfect or ambiguous language are always open to interpretation, and established rules of interpretation are invoked to determine the meaning. Hudson Canal Co. v. Pennsylvania Coal Co., 75 U.S. 276 (1868). The avowed purpose and primary function of the court is the ascertainment of the intention of the parties. Williston, Contracts, 3d Ed., § 601, Guam Code of Civil Procedure, § 1859. Under the law of Guam, a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates. Guam Civil Code, Sec. 1647.

Unfortunately, the GEDA Board did not hold a meeting on May 21, 1971, and the Stock Purchase Agreement was not executed during a meeting. However, GEDA made the decision to enter into the Stock Purchase Agreement at a meeting on May 11, 1971. The minutes of the meeting and a transcript of the meeting were admitted into evidence. Also admitted into evidence are minutes of GEDA Board meetings for the following dates: December 10, 1970, January

14, January 15, January 26, February 2, February 8, and April 16, 1971.

It is obvious from the facts as of May 1971 that MCS was out of money, was incurring large monthly operating losses, was unable to raise any additional credit, owed as much as $200,000 in current accounts payable, and was without any prospective buyers. GEDA was guarantor of a $200,000 loan made by FNCB to MCS. The loan was in default and the bank could the note at any time.

It should again be mentioned that GEDA is a public corporation whose purpose is "to assist in the implementation of an integrated program for the economic development of Guam." Section 53552(a), Government Code of Guam. It was intended that GEDA be a catalyst in economic development by aiding private enterprise without unfairly competing with it.

The transcript and minutes of the May 11, 1971 meeting and the minutes of earlier GEDA Board meetings in 1971 indicate the overriding concerns of the GEDA Board were: One, to make sure that it didn't lose the $200,000 for which it was liable; and Two, that MCS continue to operate. It appears from the evidence that throughout January, February, March, and April of 1971, GEDA paid some of MCS's accounts payable in order to keep MCS afloat.

As of May 1971, the GEDA Board had only two (2) alternatives: One, it could allow MCS to go bankrupt and pay FNCB $200,000; or Two, it could take over the stocks of MCS and keep it operating until it could find a buyer. Under the first alternative, GEDA would be sure to lose $200,000 plus whatever additional money MCS owed GEDA at that time. Under the second alternative, GEDA would assume all liabilities of MCS, totalling almost $400,000 but stood a chance of selling the company and getting some of its money back.

Throughout the first five (5) months of 1971, the GEDA Board recognized the probability that it would have to take over MCS. The evidence reflects that it was the intention of GEDA to take over MCS and to sell it back to the former shareholders if they could pay off all the obligations that GEDA had incurred with relation to MCS. The intent of the GEDA Board was clearly to offer the company to the original shareholders as a group. If the original shareholders could come up with the money to pay off all of MCS's debts, then the ownership of MCS would revert to the situation that existed prior to the takeover. The alternatives foreseen by the parties as of May 21, 1971 were either:

1. GEDA would sell MCS to the same owners it purchased it from as a group, or

2. GEDA would sell MCS to some other concern, or

3. GEDA would not be able to sell MCS to anyone and MCS would go broke.

All of the plaintiffs contend that "collective right", should be interpreted to mean that no action can be taken with regard to the right of first refusal, unless all of the former shareholders are in concurrence. In other words, if everyone wanted to abrogate the right other than one former shareholder, then the right could not be abrogated.

The parties were indeed in a serious situation. It was not their intent to jeopardize the success of their efforts to salvage MCS on the chance that one of the former shareholders may not agree with the rest of the former shareholders. The plaintiffs' contention is unreasonable in light of the surrounding circumstances.

Even when viewing Section 6 in light of secondary rules of contract interpretation, such meaning cannot be given to "collective right" by the court.

The intention, with which the law is concerned in construing and giving effect to a contract, is that of the parties at the time of entering into the contract, regardless of any events occurring afterward, at least if such subsequent events were not reasonably within the contemplation of the parties when the contract was made. 17 Am.Jur.2d, Contracts, § 244. While normally the court will not attempt to continue the intent of the parties to a contract in light of subsequent events, the incident at hand is an exception to the rule. On May 21, 1971, the plaintiffs and GEDA executed the Stock Purchase Agreement. At that point in time, the parties contemplated that somewhere in the near future the exercise of the collective right of first refusal would arise. Indeed, that issue did arise at the MCS Board meeting on July 20, 1971, more than six (6) months before any dispute arose. The transcript of the July 20, 1971 meeting provides the court with the unique opportunity to witness what the parties to the contract themselves construed Section 6 to mean. Courts strongly incline to give effect to such interpretation.

> But there is a secondary rule (Williston, Cont., § 623) that interpretation may be given to a Contract by the acts and/or declarations of the parties, done or made while the agreement is in process of fulfillment, and before any differences have arisen between them, to which "mutual interpretation" (as Dean Wigmore has called it) courts strongly and properly incline to give effect. Pressed Steel Car Co. v. Union Pacific R. Co., 297 F. 788, 790 (2nd Cir. 1924).

The transcript indicates that David Ulloa, who had previously been the majority stockholder in MCS, raised the issue of what would happen if one of the former shareholders refused to sign the waiver. At this point, Charles Troutman, legal counsel to GEDA, gave his opinion that a former shareholder who did not sign the waiver would be entitled to sue GEDA for damages incurred by GEDA's failure to wait six (6) months until selling the stock.

Toward the end of the meeting, Mr. Troutman revised his legal opinion as to the consequences of a former shareholders not signing the waiver. After having further considered Section 6, Troutman came to the conclusion that the right of first refusal was a collective right and that only the group as a whole could repurchase the shares. Troutman then stated that whatever action the group, i.e., the former stockholders, decided to take would have to be determined by a majority vote of the former stockholders just as if they were still stockholders. A dialogue then took place between Troutman and David Ulloa in which Ulloa expressed his concurrence with this interpretation. Present were three (3) members of the GEDA Board and four (4) other former shareholders, Johnny Sablan, Robert Halsey, Larry Gunn, and Albert Cruz. No one expressed any contrary interpretation of Section 6 or offered any opposition to the Troutman-Ulloa interpretation.

Troutman later followed up the matter with a written opinion elaborating and confirming his oral opinion. A copy of the opinion was available for the former shareholders to see. The evidence does not reflect whether or not any of the former shareholders saw the written opinion. However, it is clear that no objection to this interpretation of Section 6 was voiced by anyone, up to and including August 4, 1971.

The May 21, 1971 "Stock Purchase Agreement" was drafted by Edward Terlaje, counsel for the former MCS shareholders. An important rule of contract interpretation is that, one who writes the contract in question can by exactness of expression more easily

prevent mistakes in meaning than can the party who is not responsible for the choice of words. Therefore, doubts arising from the ambiguity of language are resolved in favor of the party who was not responsible for choosing that language. Williston, 3d Ed. § 621.

ACCEPTANCE OF BENEFITS FORESTALLS COMPLAINT

In any event, the fact that Richard Cruz, who is also owner of the Halsey's rights, did not sign the July 20, 1971 agreement would not give him cause to complain even if the right of first refusal was an individual right rather than a collective right. All of the plaintiffs in interest, David Ulloa, Richard Ulloa, Johnny Sablan, and Richard Cruz, subscribed to the shares of stock to which they were entitled under the July 20, 1971 agreement. Richard Cruz paid for his shares in full and received his stock certificates.

Section 1589 of the Guam Civil code provides:

> "Section 1589. Assumption of obligation by acceptance of benefits. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

Richard Cruz accepted the benefit of the July 20, 1971 agreement, but now claims that he is not bound by the obligations of that agreement. A chain of correspondence between Cruz and Larry Gunn and Lee Holmes indicates no disagreement on the part of Cruz with the July 20, and August 4, 1971 contracts. On October 8, Cruz subscribed to 570 MCS shares and received 570 shares. On October 13, 1971, Cruz paid for those shares. Plaintiffs produced a memorandum from Cruz to MCS, Inc. dated October 13, 1971 and acknowledged received by David Ulloa, President of MCS. The effect of the memorandum as pointed out earlier is that Cruz is not waiving his right under the May 21, 1971 agreement and does not accept the sales agreement between GEDA and Holmes. The existence of this memorandum is somewhat of a mystery to the court, since it was never found by Holmes, Chairman of MCS, in the MCS files. In any event, the condition that Cruz placed on his payment of $570 is of no effect. Cruz already subscribed to his shares and received his shares on October 8, 1971. At that time, Cruz accepted the benefit of the July 20, 1971 agreement and was bound by the obligation in that agreement just as if he had signed the agreement.

EQUITABLE CONSIDERATIONS

While the plaintiffs have no right to enforce against the defendants under the contracts in question, they would be prohibited from enforcing any such right if any existed by equitable considerations. The plaintiffs have come into this court on the side of equity asking the court to impress a constructive trust upon MCS in favor of themselves.

A constructive trust is an involuntary trust. Smith v. Bliss, 44 C.A.2d 171 (1941). Guam Civil Code, §224 provides:

> "Section 2224. Involuntary trust from fraud, mistake, etc. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Plaintiffs have not pled nor have they presented any evidence to show the existence of fraud, accident, mistake, undue influence, the violation of a trust, or any other wrongful act. The plaintiffs have not alleged that GEDA held a fiduciary duty with relation to them. In fact, no such relationship could exist since GEDA is a government agency, and can only be a fiduciary for the general public.

In short, the plaintiffs have not alleged proper grounds for the relief they seek, let alone shown evidence of any proper ground.

In a court of equity, a frequently stated maxim is, "He who comes into equity must come with clean hands".
4 Witkin, Summary of California Law, 7 Ed., Equity, § 7, p. 2791.

Accordingly, where the right upon which the complainant relies has grown out of a wrong, breach of duty, or a violation of the law, the court of equity will deny relief. See Baxter v. Deneen, 57 A. 601, (Court of Appeals, Maryland 1903).

Plaintiffs, and each of them, lack clean hands to bring an equitable action seeking the imposition of a constructive trust for the stock of MCS acquired by defendant Holmes, for the reason that the shares of stock of MCS originally issued were issued contrary to the provisions of law. The original shareholders, plaintiffs in this action, issued stock to themselves in return for obtaining a GEDA guaranteed loan from FNCB. Further, the plaintiffs also received shares of stock

contrary to law at the time of incorporation. At the time plaintiffs turned their shares over to GEDA under the May 21, 1971 agreements, they warranted that all of the shares (30,000 shares at par value of $10.00 per share for a total of $300,000) of MCS were validly issued and fully paid for. Both the July agreement and the August agreement incorporated the terms of the May 1971 agreements and therefor, the representations therein. David Ulloa himself was a witness to the August 4, 1971 agreement and was one of the primary beneficiaries of the unlawful issuance of stock.

Section 356, Guam Civil Code, specifically states in pertinent part:

> "....no corporation shall issue stock or bonds except in exchange for actual cash paid to the corporation or for property actually received by it at a fair valuation equal to the par value of the stock or bonds so issued...." (Emphasis added).

From the evidence, it is clear that from 1969 through 1971, 30,000 shares with a cumulative par value of $300,000 was stated on the books of MCS. In fact, no more than between $30,000 and $40,000 was paid into the corporation as required by law. By May of 1971, the company was floundering, it was insolvent and there was on the books approximately $220,000 of current accounts payable besides the GEDA guaranteed loan of $200,000 with FNCB. GEDA was required by the May 21st agreement to come in and take back the corporation in order to continue the company operations and to try to prevent the requirement of paying the $200,000 on the FNCB loan at that time. GEDA was also required to pay the trade creditors in an amount of approximately $220,000.

If the incorporators had paid in the full $300,000 as set forth in the corporate records, those funds could have been utilized to pay off the accounts payable prior to May 21, 1971 and GEDA might well not have been compelled to come in and salvage the dying operation of MCS.

It should be noted that prior to the February 28, 1972 filing of this complaint, but after the Holmes reorganization, GEDA had loaned an additional $75,000; Holmes had paid in or pledged to pay $42,000; and, on the strength of Holmes' management, an additional $177,000 of outside equity money was committed to the corporation.

Plaintiffs cannot be permitted to come into a court of equity to attempt to recapture a company which they claim, as of February, 1972, is worth $15,000,000, after (1) investing only $30,000 to $40,000, (2) misrepresenting the value of the corporation's capital unlawfully as $300,000, (3) requiring the loan by GEDA of an additional $270,000 and subsequently another $75,000, and (4) encouraging outside equity parties under the reorganization, including Holmes, to invest approximately $219,000 more. The company was insolvent and floundering during the period of time the former stockholders operated it.

After February 1972 when the company was operational and financially feasible, the plaintiffs then suddenly decided that they wished to have the stocks and operation of the company returned to them. To benefit the very persons who had created the initial distressed condition of the corporation based upon undercapitalization and the unlawful issuance of stock would be inequitable. The wrongful acts of plaintiffs are clearly related to the conduct of the subject matter of this litigation.

Furthermore, plaintiffs, other than Cruz, are estopped by the doctrine of estoppel from asserting any rights; under Section 6 of the May 21, 1971 agreement since they promised to waive those rights and knew of the reliance thereon placed by GEDA and Holmes on that promise, and failed to act to the detriment of GEDA and Holmes.

Section 90, Restatement of Contracts, states:

> "Section 90. Promise Reasonable Inducing Definite and Substantial Action. A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

GEDA has provided an additional loan of $75,000 to MCS. Holmes has invested $42,000 of his own money, has moved himself and his family to Guam, has devoted his constant labor to MCS, and has personally guaranteed loans to MCS, all in reliance on the validity of plaintiffs' July 20, 1971 promise. If plaintiffs, or any of them claim that the July 20, 1971 agreement was invalid because Cruz and Halsey did not execute it, or if the plaintiffs feel that the sale of the stock to Holmes was conditioned upon receiving financing from FNCB prior to August 4, and said plaintiffs failed to do anything to stop the transaction on August 4 before there was reliance by the parties and a

substantial change of position, then said plaintiffs had the obligation to do so immediately after August 4, 1971. They are now estopped from asserting any imagined impropriety by having stood by and watched defendants and others change their position in reliance upon agreements which were signed and executed by and contained the promises of plaintiffs.

The maxim "Equity aids the vigilant" is given application in the doctrine of laches. Those who neglect their rights may be precluded from obtaining relief in equity. 4 Witkin, Summary of California Law, 7 Ed., Equity, § 12.

Delay is not a bar to equitable relief unless it works to the disadvantage or prejudice of other parties. The application of the doctrine to a case depends almost wholly on the particular facts. 4 Witkin, supra.

Based on the same facts that applied under the doctrine of estoppel, the doctrine of laches should be applied: in this case. If the plaintiffs believed they had been defrauded, then evidence of that fraud, i.e., the failure of the FNCB loan to come through, or if plaintiffs believed that the July 20, 1971 agreement was invalid, then they could have voiced their position in August of 1971 before GEDA and Holmes incurred large cash liabilities and considerable time, effort and reputation on the part of Holmes. However, plaintiffs chose to wait until it was evident that the company had been turned around, reached the breakeven point and was faced with the prospects of a bright future. It would be unfair to allow the plaintiffs to capitalize on their delay to the detriment of defendants.

CONCLUSION

Plaintiffs are not entitled to enforce the nonexistent right they seek to enforce. If such right existed, they would be barred by equitable considerations.

Plaintiffs' complaint is dismissed.

Let Judgment issue.

SO ORDERED.

Dated this 16th day of February, 1977.

/s/
CRISTOBAL C. DUENAS
JUDGE, DISTRICT COURT OF GUAM

IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

GUAM ECONOMIC DEVELOPMENT AUTHORITY, a public corporation, et al.	CIVIL CASE NO. 24-72
Plaintiffs,	MEMORANDUM ORDER GRANTING
vs.	IN PART AND DENYING IN PART
DAVID J. ULLOA, et al.,	PLAINTIFFS' MOTION FOR A JUDGMENT
Defendants.	N.O.V. AND IN THE ALTERNATIVE FOR A NEW TRIAL

The court has viewed the evidence in a light most favorable to the defendants, because as prevailing parties in a jury trial, they should enjoy the benefit of every reasonable inference. While a jury's finding must be afforded great weight az)d ;:aspect, the court has concluded that the jury's verdict was clearly erroneous and that the motion for a Judgment N.O.V. must be granted in favor of Marianas Communications Systems, Inc., (MCS).[1]

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1 The defendants have suggested that the plaintiffs' motion for a directed verdict was improper because it was made after the court had already instructed the jury. it is true that Rule 50(a) requires a motion for a directed verdict "at the close of the evidence offered by an opponent.' However, as Wright and Miller states in section 2537 at pages 596-97, even though a motion for a directed verdict must be made at the close of all evidence, "the courts take a liberal view of what constitutes a motion for directed verdict in deciding whether there was a sufficient prerequisite for the motion for judgivent. The defendants have not offered a case where a motion for directed verdic made after jury instructions was held fatal to a motion for Judgment N.O.V., and the court has likewise been unable to find any such case directly on point. it

Section 331 of the Guam Civil Code clearly gives a corporation a cuase of action against stockholders who have not fully paid their subscriptions for capital stock:

> "Section 331. Directors may levy. The board of directors or trustees of any stock corporation formed, organized, or existing, under this Title may at any time declare due and payable to the corporation unpaid subscriptions to the capital stock and may collect the same with interest accrued thereon or such percentage of said unpaid subscriptions as it may deem necessary." [Enacted 1953.]

By virtue of Section 331, MCS would have a valid cause of action against the defendants unless:

(1) MCS was not a "stock corporation formed, organized, or existing under this Title..." (i.e. Corporations, General Law).

(2) The board of directors did not "declare due and payable to the corporation unpaid subscriptions to the capital stock..."

(3) That the defendants did not owe "unpaid subscriptions to the capital stock..."

As to (1), abundant evidence was offered to show that MCS was a corporation formed under the laws of Guam. it had filed its Articles with the Director of Revenue and Taxation, and it had received a corporate certificate. (See Section 296 of the Guam Civil Code). As Section 297 of the Guam Civil Code makes clear, a copy of the Articles of Incorporation, once filed with the Director of Revenue and Taxation, "shall be received in the courts and all other claces as

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is true that a technical reading of this rule would seem to require the plaintiffs to have made their motion for a directed verdict immediately after the defendant offered his case, but at least one case has held that such a motion may be made after closing arguments. Martin v. Erie Lackawanna Railroad 388 P.2d 802, 804 (6th Cir. 1968). The court rules that plaintiffs' motion for a directd verdict was properly made under Rule 50(a), because any other result 'could be to enshrine form over substance." Moran v. Raymond Corporation, 484 F.2d 1008, 1014 (7th Cir. 1973).

prima facie evidence of the facts therein stated." Finally, no contrary evidence was offered to suggest that MCS was not a corporation formed under the laws of Guam.

With regard to (2), Lee Holmes, the president of MCS, stated that the board of directors of MCS had declared the stocks in question "due and payable." This testimony was not contradicted in any way by the defendants, and the jury could not have had any basis for doubting this fact.

Finally, there can be no question as to (3), that the defendants owed unpaid subscriptions to the capital stock. Uncontradicted testimony and evidence offered by all parties make it very clear that on April 29, 1968, David Ulloa, Richard Ulloa, Richard Cruz and Frank Okiyama executed MCS's Articles of Incorporation and signed the following subscriptions, (Plaintiffs' Exhibit #1):

David Ulloa	510 Shages (@$100/share)	$5,100
Richard Ulloa	90 Shares (@$100/share)	$900
Richard Cruz	100 Shares (@$100/share)	$1,000
Frank okiyama	300 Shares (@$100/share)	$3,000.

In addition, on April 12, 1969, these same defendants signed subscriptions to the following additional amounts, (Plaintiffs' Exhibit #2):

David Ulloa	14,790 Shares (@$100/share)	$147,900
Richard Ulloa	3,510 Shares (@$100/share)	$35,100
Richard Cruz	3,500 Shares (@$100/share)	$35,000
Frank Okiyama	1,200 Shares (@$100/share)	$12,000.

Also, the testimony is uncontradicted that while Johnny Sablan, received $45,000 in MCS stock, he only paid $25,000 for such shares. Also, Mr. and Mrs. Gunn never paid for their subscriptions.

It is clear that none of the above defendants paid valid legal consideration for these shares (with the exception of Johnny Sablan). Section 356 of the Guam Civil Code states that "no corporation shall issue stocks or bones except in exchange for actual cash paid to the corporation or for property actually received by it at a fair value..." The defendants did claim that they were under the mistaken impression that the value of their services to the corporation could be a valid method of exchange; however, it is quite clear that the Guam Civil Code does not recognize this form of consideration. If, as the defendants insist, their mistaken reliance on a California corporations

handbook could excuse satisfying the requirements of the Guam Civil Code, Section 356 could always be circumvented by claiming simple Ignorance. As responsible businessmen attempting to form corporation under the laws of Guam, the defendants had a duty to determine exactly what the law required as to valid consideration for stocks issued. Any mistaken belief on their part is irrelevant because the requirements of the Guam Civil Code must control here.

After trial, the defendants introduced a new issue as to whether there was actually a valid subscription agreement, (thus perhaps negating the effect of Section 331). However, this factual issue was never properly before the jury (having never been argued or raised by a requested jury instruction). Any questions of the defendants' intent when they subscribed for the stocks was introduced by the plaintiffs to relate only to the elements of their cause of action and these facts never related to a possible defense regarding statutory liability. There was never any question raised at trial whether or not the subscriction agreements were valid, and the defendants cannot raise such an issue at this late date.

Defendants have also relied on Bing Crosby Minute Maid Corporation v. Eaton, 46 Cal.2d 484, 297 P.2d 5 (1956), for the proposition that Section 331 of the Guam Civil Code should not be interpreted to provide for statutory liability for watered stock when most jurisdictions seem to be content to limit such liability on a misrepresentation theory.[2]

As the plaintiffs correctly point out, the case deals with California statutes which cannot be equated to Guam's statutory scheme for liability. Unlike Section 1110 of the California Corporations Code (now repealed; originally Civ. Code §299), Section 331 of the Guam Civil Code clearly expresses "an intent to broaden the bdsis of liability of holders of watered stock ... " (297 P.2d 9). Such an intent to provide for liability on a basis in addition to a misrepresentation theory is also made clear by Section 340 of the Civil Code which states that:

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2 See Volume 44 of the California Law Review at pages 941-95 for the view that Minute Maid was incorrectly decided and that there actually was statuary liability under the California Code for watered stock.

> Nothing in this Title shall prevent the directors from collecting, by action in any court of proper jurisdiction, the amount due on any unpaid subscription, together with accrued interest and costs and expenses incurred.

Clearly the legislature intended Sections 331 and 340 to provide corporations with a statutory cause of action in the event that shareholder failed to pay complete and adequate consideration for unpaid subscriptions. This court is not sitting in equity and it must give legal effect to these Provisions of the Guam Civil Code. Since all the facts necessary to establish liability under Section 331 are uncontroverted, as a matter of laxer, the defendants are liable to MCS for "unpaid subscriptions to the capital stock ... with interest accrued thereon..."

Plaintiffs have also asked for a Judgment N.O.V. on the grounds that there could have been no factual question as to whether there was a breach of warranty between the defendants and Lee Holmes and GEDA, and whether certain other defendants are automatically liable to the plaintiffs because they were in default.

As the defendants correctly point out, a motion for a Judgment N.O.V. is generally restricted to the issues which have been raised on a motion for a directed verdict. See Rule 50, F.R.C.P. and Wright and Miller, Section 2537. While the plaintiffs argue that liberality should be the rule when interpreting whether a motion for a Judgment N.O.V. should be granted, they have failed to cite any cases contrary to the weight of authority which restricts a party from asserting a ground not raised in the motion for a directed verdict. Therefore, the plaintiffg motion for a Judgment N.O.V. on the breach of warranty cause of action must be denied.

However, as Wright and Miller make clear in Section 2537 (at page 598), a party's failure to raise certain issues in a motion for directed verdict does not affect his right to a new trial. See Rule 59, F.R.C.P.; also Sears v. Pauly, 261 F.2d 304 (1st Cir. 1958). The jury's finding that there was no breach of warranty by the defendants is against the clear weight of the evidence. It seems clear that there was a warranty that the stocks were paid for when in fact only a fraction of the subscriptions was actually paid. (Plaintiffs' Exhibits #23 and #13). Since the jury's finding that the defendants were not liable for breach of warranty is against the clear weight of the evidence, the plaintiffs' motion for a new trial is granted.

The plaintiffs have also moved for a judgment N.O.V. against Frank Okiyama, Marie Okiyama and Pat Cruz, all of whom defaulted before trial. Since these defendants had defaulted their liability was already legally determined and the jury only had power to determine the measure of their liability. Clearly the jury was acting in excess of its powers in finding that the defaulting defendants were nct actually liable to plaintiffs and such a finding cannot be given any effect. Since the question of actual liability had already been determined it was not before the jury, and counsel for the Plaintiffs had no reason to expect that the jury would make a finding in this area (except as to the amount of damages). It would be unfair to require counsel to make a motion for a directed verdict on an issue which had already been legally determined and which the jury had no power to consider. Furthermore, since the court had found that the other defendants were liable to the plaintiff corporation under Section 331, the defaulting defendants must be found similarly liable for the ainount of their unpaid subscriptions.

Conclusion

Rule 50(c) of F.R.C.P. requires the District Court to rule both on the motion for Judgment N.O.V. and the motion for a new trial.

The court grants the motion for a Judgment N.O.V. in favor of MCS on a statutory liability theory because ihere can be no question that subscriptions were due and payable and that the defendants David Ulloa, Richard Ulloa, Richard Cruz, and Frank Okiyama failed to pay any legal consideration for these shares. There also can be no question that Johnny Sablan failed to pay full valid consideration for the shares which he received. The court denies a motion in the alternative for a new trial because it is of the opinion that the facts introduced by the plaintiff corporation in support of its statutory liability theory are uncontroverted and it would serve little purpose to present this issua to a new jury.

The court denies the motion for a Judgment N.O.V. in favor of Lee Holmes against GEDA based on a breach of warranty theory because no such ground was raised by the plaintiffs' motion for directed verdict. However, the plaintiffs' motion for a new trial is granted because the jury's finding that there was no breach of warranty is against the weight of the evidence.

The court grants the motion for Judgment N.O.V. in favor of the plaintiffs against Frank Okiyama, Marie Okiyama and Pat Cruz. Since these defendants were in default the jury had no power to

determine anything but the measure of damages and the finding that the defendants were not liable is clearly erroneous. On a statutory liability theory, there can be no factual question that these defendants are liable for the amount due on their unpaid subscriptions. The court denies the alternative motion for a new trial for the same reasons outlin above and because these defendants are in default and their liability is no longer contested.

LET JUDGMENT ISSUE.

SO ORDERED.

Dated this 18th day of November, 1977.

/s/
CRISTOBAL C. DUENAS
JUDGE, DISTRICT COURT OF GUAM

IN THE DISTRICT COURT OF GUAM

TERRITORY OF GUAM

GUAM ECONOMIC DEVELOPMENT AUTHORITY, a public corporation, et al. Plaintiffs, vs. DAVID J. ULLOA, et al., Defendants.	CIVIL CASE NO. 197-72 JUDGMENT (N.O.V.)

The jury having rendered a verdict in favor of all the named defendants and Judgment on the Verdict having been entered on October 5, 1977, the plaintiffs have moved for a Judgment N.O.V. or in the alternative for a new trial. The Court having heard the arguments of counsel for the respective parties and being fully advised in the premises;

IT IS HEREBY ORDERED that the plaintiff MCS recover of the defendants the following sums, notwithstanding the verdict of the Jury, together with costs and charges:

David and Juanita Ulloa....$153,000
Richard Ulloa.....$ 36,000
Richard and Pat Cruz.....$ 36,000
Larry and Frances Cunn.....$ 6,500
Frank and Marie Okiyama..$ 15,000
Johnny G. Sablan.....$ 20,000.

Dated: November 18, 1977

/s/
CRISTOBAL C. DUENAS
JUDGE, DISTRICT COURT OF GUAM

David J. ULLOA, Richard F. Ulloa and
Johnny Guevara Sablan,
Plaintiffs-Appellants,

v.

GUAM ECONOMIC DEVELOPMENT AUTHORITY, a Public Corporation, and Lee M. Holmes, Defendants-Appellees.

Robert E. HALSEY, Joan M. Halsey and
Richard G. Cruz, Plaintiffs-Appellants,

v.

GUAM ECONOMIC DEVELOPMENT AUTHORITY, a Public Corporation, and Lee M. Holmes, Defendants-Appellees.

Nos. 77-2509, 77-3538.

580 F.2d 952

United States Court of Appeals,
Ninth Circuit.

Aug. 16, 1978.

Former shareholders of Guam corporation brought suit alleging that, due to the bad faith of defendants, the Guam Economic Development Authority had failed to first offer to the former shareholders, as required under certain stock purchase agreements, the 21,000 shares of stock that the GEDA had sold to the individual defendant. The former shareholders requested that the court impose a constructive trust in their favor. The United States District Court for the Territory of Guam, Cristobal C. Duenas, J., ruled in favor of defendants, and six of the former shareholders appealed. The Court of Appeals, Wong, District Judge, sitting by designation, held that: (1) the agreement under which the former shareholders purportedly waived their rights of first refusal was not rendered invalid by reason of the lack of a quorum of the GEDA board; (2) unanimous consent of the former shareholders was not required in order to modify certain earlier stock purchase agreements; (3) the language of the stock purchase agreements did not overcome the presumption created by the Guam Civil Code that the right of first refusal possessed by the former shareholders was joint and not several; (4) under all the

circumstances, the trial court did not abuse discretion in denying the former shareholders' motion to amend the pretrial order to include the issue of fraud; (5) if the former shareholders intended to rely on fraud as a basis for obtaining a constructive trust, fraud was an element that had to be affirmatively pleaded and proved, and (6) the district court did not commit clear error in holding that plaintiffs failed to fulfill the requirements of a constructive trust.

Affirmed.

1. Corporations §426(12)

General rule with respect to ratification is that ratification of a contract or other act will be implied if the corporation, represented by a board of directors who have knowledge of the facts, accepts and retains the benefits of the contract or act or recognizes the contract as binding or acquiesces in the contract; ratification may be by acquiescence.

2. Corporations §137

Despite fact that no quorum of the Guam Economic Development Authority board was present at meeting when agreement was reached under which shareholders purportedly waived rights of first refusal afforded them by a prior stock purchase agreement between GEDA and the shareholders, where the GEDA board had power to enter into the second agreement and the conduct of the GEDA board subsequent to signing the second agreement was unequivocally sufficient to establish ratification, the agreement was not invalid because of the lack of a quorum. Government Code Guam § 53558(c).

3. Corporations §113

Even when read in conjunction with provision of stock purchase agreement that the agreement could only be changed by a writing signed by the party against whom enforcement of change or waiver was sought, term "collective right" in section of the agreement prohibiting the Guam Economic Development Authority from transferring or disposing of certain shares of stock unless the shares had first been offered for sale to the former stockholders and that the stockholders' right of first refusal was a "collective right" did not require that the agreement could be modified only by unanimous consent of the former shareholders, some of whom owned but a de minimis fraction of the outstanding shares; though term "collective right" was ambiguous, an interpretation requiring unanimity of consent was unreasonable in light of financial risk to GEDA.

4. Corporations §113

Language of stock purchase agreement whereby the Guam Economic Development Authority was prohibited from transferring certain stock unless stock was first offered further stated "This right of first refusal is not an individual right to a shareholder to reacquire the shares transferred. . . [but] is a collective right" was not sufficient to overcome presumption created by the Guam Civil Code that the right of first refusal possessed by the former shareholders was joint and not several, Civil Code Guam § 1431.

5. Corporations §137

Where agreement which released the Guam Economic Development Authority from its promise to afford former shareholders a right of first refusal with respect to shares purchased the GEDA was signed by all but three of the 16 former shareholders who had signed the original agreement containing the right of first refusal, the signatories to the later agreement thereby discharged the GEDA of its obligation to the other former shareholders as well.

6. Federal Civil Procedure §1935

In view of fact that appellants completely failed to substantiate their claim of lack of undue prejudice and of their failure to specifically identify fraud in any of the pleadings and in view of the three-year delay in moving to amend a pretrial order and fact that the issue of fraud was raised for the first time on the eve of trial, district court did not abuse discretion in denying motion to amend pretrial order so as to include issue of fraud.

7. Federal Civil Procedure §636

If former shareholders intended to rely on fraud as a basis for obtaining a constructive trust in some 21,000 shares, shareholders were required to affirmatively plead and prove fraud with specificity. Civil Honorable Dick Yin Wong, United States District Judge, District of Hawaii, sitting by designation.
Code Guam § 1431; Fed.Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

8. Trusts §110

Evidence in suit wherein former shareholders sought imposition of a constructive trust in favor of them over some 21,000 shares did not support shareholders' contention that they were induced by a fraudulent representation into entering into an agreement whereby they waived their rights of first refusal under an earlier stock purchase agreement.

Robert D. Wyatt (argued), John A. Bohn (argued), Agana, Guam, for plaintiffs-appellants.

George T. Okamura of Damon, Shigekane, Key & Char, Honolulu, Hawaii, for David J. Ulloa et al.

J. Bradley Klemm (argued), of Klemm, Dear & Lawrence, Agana, Guam, and Vernon F. L. Char (argued), Damon, Shigekane, Key & Char, Honolulu, Hawaii, for Robert E. Halsey et al.

Appeal from the United States District Court for the Territory of Guam.

Before CHAMBERS and WALLACE, Circuit Judges, and WONG, District Judge.

WONG, District Judge:

Appellants in consolidated Case Nos. 77-2509 and 77-3538 are six of the 16 former shareholders of Marianas Communications Systems, Inc. ("MCS"), a Guam corporation founded in 1968 for the purpose of establishing a cable television system for Guam and the Northern Marianas.[1] By 1969, the corporation was in need of extra funds, and the officers and shareholders of MCS sought to obtain the additional financing from the Guam Economic Development Authority ("GEDA"), an incorporated government agency created for the purpose of stimulating economic growth in the Territory of Guam. GEDA ultimately agreed to guarantee a loan in the amount of $200,000 obtained by MCS from the Guam offices Of the First National City Bank ("FNCB").

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[1] The six Appellants are Robert and Jim Halsey, Richard Cruz, David Ulloa, Richard Ulloa, and Johnny Sablan. Most of the remaining 10 former shareholders assigned their interests in the action below and in any MCS stock to D. Ulloa in September and October of 1974. See C.T. 403--409. By Order filed April 18, 1975, nine of these remaining 10 shareholders were dismissed by the trial court for lack of prosecution. In its Opinion, the district court also found that on August 1. 1971, Robert and Joan Halsey sold their entire interest in any Mcs shares to Richard Cruz. See C.T. 693, 406.

Throughout the years 1971 and 1972, MCS continued to experience severe financial difficulties. After the failure of at least two attempts by MCS to obtain needed capital from outside corporations, MCS once again turned to GEDA. By a Stock Purchase Agreement dated May 21, 1971, each of the MCS shareholders agreed to sell, for a nominal consideration, all of the issued MCS stock to GEDA, who was in turn to assume all of the outstanding obligations of MCS and attempt to transform MCS into a viable enterprise. Section 6 of the Stock Purchase Agreement prohibited GEDA from transferring, alienating or in any way disposing of any MCS shares unless such shares were first offered for sale to the original 16 MCS shareholders. The shareholders' right of first refusal was set at a purchase price equal to the total amount of money expended and incurred by GEDA in the operation of the company.

By a supplemental Agreement also entered into on May 21, 1971, each of the MCS shareholders and GEDA agreed that notwithstanding Section 6 of the Stock Purchase Agreement, GEDA would be further prohibited from offering for sale any of the MCS shares within 180 days of the May 21st Agreement. Both the Stock Purchase Agreement and supplemental Agreement (hereinafter referred to as "May 21st agreements") were signed by each of the 16 MCS shareholders and James Halliday, the GEDA Administrator.[2]

Less than two months after the May 21st agreements were entered into, GEDA was approached by Lee Holmes, who, with the support of David Ulloa, met with the GEDA Board on July 14, 1971 to discuss the possible sale of MCS. In its most basic terms, Holmes proposed to purchase 21,000 shares (70 percent) of MCS stock for a total purchase price of $42,000; to have GEDA offer, in varying amounts, 4,500 shares (15 percent) of MCS stock to the former MCS shareholders; to have GEDA retain the remaining 4,500 shares (15 percent) until the GEDA loan was paid off, at which time the shares were to be offered by GEDA to Holmes, D. Ulloa, Sablan, and three other former MCS shareholders at $4.00 per share; and to have both GEDA and FNCB increase their respective loans by $50,000 each.

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2 A question subsequently arose as to whether Halliday possessed the authority to bind GEDA to the may 21st agreements. At a GEDA Board meeting held on August 3, 1971, the Board unanimously agreed to ratify the May 21st agreements. See C.T. 59.

Holmes' proposal was favorably greeted by the GEDA Board, and on July 20,1971, a meeting between Holmes, three of the seven GEDA Board members, and five of the former MCS shareholders was held to further discuss the proposal. This meeting resulted in the drawing up of an Agreement, dated July 20, 1971, providing for the cancellation of both the former MCS shareholders' right of first refusal contained in Section 6 of the May 21st Stock Purchase Agreement and the 180-day prohibition of the sale of MCS stock contained in paragraph 2 of the May 21st supplemental Agreement. The July 20th Agreement was conditioned upon the execution of a contract by Holmes, GEDA, and MCS for the sale of MCS stock to Holmes, and was signed by Guy Wharton (on behalf of GEDA), Holmes, and all of the 16 former MCS shareholders except Richard Cruz and Robert and Joan Halsey.

Further meetings of the GEDA Board were held on August 2 and 3, 1971, and by an Agreement for Sale of MCS Stock dated August 4, 1971, GEDA agreed to sell 70 percent of the MCS stock to Holmes on the terms described above, with the exception of the deletion of any reference to a $50,000 matching loan from FNCB. This August 4th Agreement was signed by Jesus Guerrero (on behalf of GEDA), Halliday (on behalf of MCS), Holmes, and witnessed and signed by D. Ulloa and one J. S. Perez.

Pursuant to the terms of the August 4th Agreement, the shares of MCS stock prescribed therein were sold by GEDA to Holmes and the former MCS shareholders. On February 28, 1972, the 16 former MCS shareholders filed suit, claiming, *inter alia*, that due to the bad faith of defendants Holmes and GEDA, the latter had failed to first offer to them, as required under the May 21st agreements, the 21,000 shares of MCS stock sold to Holmes. The former MCS shareholders therefore requested that the court impose a constructive trust in favor of them over the 21,000 shares.

The trial court ruled in favor of Holmes and GEDA, and six of the former shareholders appealed, raising a number of issues for this Court's consideration.

[1,2] Appellants first claim that the July 20th Agreement, under which the former MCS shareholders purportedly waived their rights of first refusal, is not a binding agreement due to the lack of a quorum of the GEDA Board. It is clear that the July 20th Agreement was not properly transacted due to the absence of a Board quorum. Guam Government Code, § 53558(c). While no Guam case law exists

on this point, it is also clear, however, that the general rule with respect to ratification is that

> "ratification of a contract or other act will be implied if the corporation, represented by the board of directors, who have knowledge of the facts, accepts and retains the benefits of the contract or act, or recognizes it as binding, or acquiesces in it. They may ratify by acquiescence, and need not act at a meeting regularly called, but may ratify without any formal action. 2 Fletcher Cyc. Corp. § 762.

See also Petroleum Anchor Equipment, Inc. v. Tyra, 419 S.W.2d 829, 834 (Tex.Sup. Ct.1967) ("Ratification of an unauthorized act may be express or it may be implied from a course of conduct . . .."); *See-Tee Mining Corp. v. National Sales, Inc.*, 76 N.M. 677, 417 P.2d 810, 812 (1966) ("Ratification of the action of a corporate officer for which there may have been no antecedent authority may be express or implied [citations omitted), and may be implied by the corporation's acquiescence in or recognition of its officer's unauthorized act, or by the corporation's acts tending to show an acceptance or adoption of the contract [citations omitted]"); *Monteleone v. Southern California*, 26.4 Cal.App.2d 798, 70 Cal.Rptr. 703 (Second Dist.1968); *Johnson v. Community Development Corp.*, 222 N.W.2d 847 (N.D.Sup.Ct.1974); 19 C.J.S. *Corporations* § 1141 (1940).

That the GEDA Board possessed the original authority to enter into a contract in the nature of the July 20th Agreement cannot be disputed. Guam Government Code, § 53553.

An examination of the conduct of the GEDA Board subsequent to the signing of the July 20th Agreement unequivocally demonstrates Board action sufficient to establish ratification. As the July 20th Agreement states in paragraph 4 thereof, the Agreement was conditioned upon the execution of a contract for sale of MCS stock to Holmes among GEDA, MCS, and Holmes. Holmes in fact subsequently submitted a proposed contract of sale for GEDA's consideration, paragraph 5 of which explicitly referred to the fact that by the July 20th Agreement, GEDA and the former MCS shareholders agreed to abrogate the latter's rights of first refusal contained in the May 21st agreements. This paragraph was specifically discussed at the August 2nd and 3rd GEDA Board meetings. The following notation was entered in the minutes of the August 3rd meeting:

"Section [paragraph] 5 [of Holmes' proposed contract] -- The Administrator [of GEDA] pointed out that the last part of this section regarding the abrogation of the former shareholders had been changed to read . . . 'GEDA will jointly with Holmes and MCS defend any claim thereon by any persons or other entity.' The Board agreed to this."

Therefore, not only did the GEDA Board recognize the existence of the July 20th Agreement, but it was even willing to go so far as to agree to defend Holmes and MCS on any claim arising from the Agreement. Finally, of course, by that Agreement for Sale of MCS Stock dated August 4, 1971, and agreed upon at the August 2nd and 3rd Board meetings, GEDA agreed to sell 21,000 shares to Holmes, despite the fact that on the previous day, the Board had specifically ratified the May 21st agreements containing the former MCS shareholders' rights of first refusal. Paragraph 5 of the August 4th Agreement both recognized the July 20th abrogation of the former Shareholders' rights of first refusal and asserted the obligation to defend noted above. Appellants do not contend that quorum was lacking at the August 2nd and 3rd meetings, and, as indicated previously, the August 4th agreement was witnessed and signed by D. Ulloa. Subsequently, of course, GEDA did in fact sell MCS stock to Holmes and the former shareholders pursuant to the August 4th Agreement.

Under these circumstances, for this Court to now hold that the July 20th Agreement was not ratified by the Board would not only serve to completely vitiate the clearly expressed intent of the Board and elevate mere formalism over substance, but would also serve to permit the former MCS share. holders to evade a contract they freely and willingly entered into.

[3] Richard Cruz raises the further argument that because he did not sign the July 20th Agreement, it was not binding upon him. Section 6 of the May 21st Stock Purchase Agreement provides in pertinent part that:

"GEDA shall not transfer, alienate or in any way dispose of any shares of the Company unless such share shall first have been offered for sale to the Stockholders. . . . This right of first refusal is not an individual right to a shareholder to reacquire the shares transferred by that individual stockholder by this agreement or any other shares. The right of first refusal is a collective right and all shares offered for

sale by GEDA must be acquired under the same terms and conditions as set forth in the preceding paragraph."

Section 7 (entitled "Miscellaneous") of the Agreement states in subsection (a) that:

> "This agreement contains the entire agreement between the parties and can only be changed by agreement in writing signed [)y the party against whom enforcement of any change, waiver, modification or discharge is sought."

This Court agrees with the trial court that the term "collective right," even when read in conjunction with Section 7(a) of the Agreement, is ambiguous, and we agree with the trial court's interpretation thereof. As pointed out by the district court, the May 21st agreements were entered into at a time when MCS was in dire financial straits. GEDA, in assuming control over the corporation, obviously needed as much flexibility and freedom to operate as possible. To hold that the May 21st agreements could be modified only by unanimous consent of the 16 former MCS shareholders (some of whom owned but a *de minimis* fraction of the outstanding shares) would amount to an unreasonable interpretation of the term "collective right" in light of the risk such an interpretation would impose upon the future success and viability of the corporation. Moreover, the "non-unanimity" view was expressed both orally and in writing by Charles Troutman, legal counsel to GEDA, and no objection to such a view was voiced by any of the former MCS shareholders.

[4] Further support of the trial court's interpretation can be found in § 1431 of the Guam Civil Code, which section provides in pertinent part that:

> "An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to I>e joint and not several. . . . This presumption in the case of a right, can be overcome only by express words to the contrary."

In interpreting the words "joint right," § 130(b) of the Restatement, Contracts, provides that:

> ".... [A] discharge by a joint obligee of his individual right operates as a discharge of the joint right of all....
>
> "Illustration:

"1. A, B and C have a joint right to the delivery of a horse by D. A discharged D from any duty to himself in consideration of $50 paid by D to A. This discharges D's duty to B and C as well as to A. It would be otherwise if with D's knowledge, A was acting with intent to defraud B and C."

See also Forbes v. First Camden National Bank, 25 N.J.Super. 17, 95 A.2d 416, 418-419 (1953) ("[I]t is the general rule that each of several joint obligees has power to discharge the entire claim by release, or accord and satisfaction, or the acceptance of payment of other performance. Thus, in *Ely v. Ely*, 70 N.J.L. 31, 56 A. 246 (Sup.Ct. 1903), one joint creditor, acting without the knowledge or consent of his co-obligee, accepted from the debtor a horse and a small sum of money in satisfaction of the debt; and the court held that the obligation to both creditors was discharged. To a like effect are Restatement, Contracts, § 130; Williston, Contracts, § 344; and Annotation in 142 A.L.R. 371. Professor Williston, at § 317, finds an implied agency whereby each obligee is empowered to act for all in relation to the debt.").

[5] The language of the May 21st agreements does not succeed in overcoming the presumption created by § 1431 of the Guam Civil Code that the right of first refusal possessed by the former MCS shareholders was joint, and not several. By releasing GEDA of its promise to afford the former MCS shareholders first refusal in consideration for the right to later purchase MCS stock, the signatories to the July 20th Agreement thereby discharged GEDA of its obligation to the other former MCS shareholders (i. e., Cruz and the Halseys) as well.

Appellants further contend that even if the July 20th Agreement is deemed to be binding upon all parties concerned, Holmes and/or GEDA acted fraudulently, in bad faith, and/or breached their fiduciary duties, and a constructive trust over the 21,000 shares owned by Holmes should therefore be imposed in favor of them.[3] The trial court held that "Plaintiffs have not pled nor

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[3] Section 2224 of the Guam Civil Code provides that:

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other

have they presented any evidence to show the existence of fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act." (C.T. 701.)

[6] The complaint in this case was filed on February 28, 1972. Trial was ordered set for October 28, 1975. On October 20, 1975, GEDA and Holmes filed a Trial Memorandum in which they stated, *inter alia*, that since fraud had been neither specifically pleaded in the complaint as required by Rule 9(b) of the Federal Rules of Civil Procedure nor included in the pretrial order as an issue for trial, the plaintiffs should be precluded from trying the issue of fraud. In a memorandum filed October 22, 1975, the plaintiffs conceded that with respect to the issue of fraud, they had failed to satisfy the specificity requirements of Rule 9(b) and include it in the pretrial order. The plaintiffs therefore moved to amend the pretrial order so as to include the issue of fraud. This motion was denied by the trial court, apparently on the ground that it was "untimely and prejudicial to the defendants and was not supported by the evidence." (C.T. 687.) Although Appellants claim in their Opening Brief that "There was no 'undue prejudice' t.0 defendant because the discovery proceedings had made amply clear to defendants the intention of plaintiffs to introduce such evidence," they are unable to point to anything in the record to support this contention. Given the complete failure of Appellants to substantiate their claim of lack of undue prejudice, the failure to specifically identity fraud in any of the pleadings, the three-year delay in moving to amend the pretrial order (which order was filed on October 18, 1972), and the raising of the issue of fraud on the eve of trial, we cannot say that the trial court abused its discretion in denying the plaintiffs' motion.

Appellants also contend that the trial court erred in denying their post-trial motion to amend the pre-trial order to conform to proof. F.R.Civ.P. 15(b). While it is true that the trial court did state that the plaintiffs had failed to plead the existence of fraud, it also found that the plaintiffs failed to present any evidence to show the existence of fraud. Under these circumstances, then, the question of whether the trial court erred in denying the motion to conform to the evidence collapses into the issue of whether the trial court erred in concluding

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wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

that the plaintiffs had failed to prove the elements of a constructive trust (discussed *infra*).

[7] Finally, Appellants argue that fraud was simply a "defense to Appellees' defense" and therefore did not fall within the specificity requirements of Rule 9(b). Whether a "defense to a defense" falls within Rule 9(b) is a question we need not answer at this time, for it is clear that the thrust of the plaintiffs' complaint was to seek a constructive trust over the shares owned by Holmes. As provided by § 2224 of the Guam Civil Code, fraud, mistake, undue influence, etc., must be established in order to obtain a constructive trust. If the plaintiffs intended to rely upon fraud as a basis for obtaining a constructive trust, it was an element which had to be affirmatively pleaded and proved and therefore fell within the prescriptions of Rule 9(b).

[8] Appellants claim that they are entitled to a constructive trust on the ground that they were induced into entering into the July 20th Agreement by the fraudulent representation of Holmes that he would obtain a firm loan commitment from FNCB prior to purchasing any MCS stock from GEDA. In fact, no such loan commitment was ever obtained from FNCB, or any other lending institution.

As those portions of the transcript of the July 20th meeting between the former MCS shareholders and GEDA Board members quoted in the margin clearly indicate, however, D. Ulloa specifically agreed to withdraw the shareholders' request for a firm loan commitment.[4] That the sale of MCS stock to Holmes was not made

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4 "Mr. Ulloa: In other words, you're saying that the agreement between you and GEDA would be contingent upon securing this thing from the bank?

"Mr. Holmes; Absolutely. You bet. That's why I don't want to have them sign the thing too. By gosh, to get the bank to sign a contract-it's a lot different, you can sign a note to the bank and they're very happy to okay it, but to get a bank to sign a contract, I don't know what that involves with this bank here. I know what it involves in the States. They've got to get the loan board together, or somebody else (comment here by M,. Ulloa but cannot be understood) and it's a real paid (sic). I just think it's an

contingent upon the securing of a loan commitment is made even clearer by the following statement made by D. Ulloa at the July 20th meeting:

> "Mr. Ulloa: I think with the understanding that-it's solely between GEDA and Mr. Holmes-if the bank does not come up with these funds, or whatever the source that Mr. Holmes has as far as his resources to raise money, I think we could leave it up to you people-I think GEDA, we're going to let GEDA be the guardian of our interest, then and see that they weight the factor and in the event that there's nonceivable there's no commitment anyplace, I think it's entirely up to GEDA to consummate the deal or not."

The above statement of D. Ulloa clearly indicates that the former MCS shareholders were forsaking any further interest in the question of whether Holmes would be able to obtain additional funds and from what source, and that it was entirely up to GEDA and Holmes as to whether any MCS shares would be sold to Holmes.

That Holmes was not being required to obtain any loan commitment prior to his purchase of MCS stock is further substantiated by those portions of the transcript of the August 3rd GEDA Board meeting quoted in the margin.[5] Moreover, the August

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unnecessary complication.

"Mr. Cepeda: Mr. Holmes, I don't think M,. Ulloa's referring to having the bank in the contract itself, signing it.

"Mr. Ulloa: No.

"Mr. Cepeda: Just a condition in there that the $50,000.00 as proposed in your letter be raised by either First City Bank or any other lending institution, or for that matter, probably any individual as a loan to MCS.

"Mr. Ulloa: Yeah, you know we don't care what the source is." R.T. 253-254.

5 "Mr. Holmes: Does it have to be FNCB?

"Mr. Wharton: I was going to say that we could make that FNCB or some other financial institution, or some other lender.

"Mr. Guerrero: Or some other lending institution.

"Mr. Wharton: Or some other lender, it doesn't have to be an institution.

"Mr. Perry: Some other source.

"Mr. Guerrero; Some other lender acceptable to GEDA, you know, could be an individual, could be anybody.

"Mr. Holmes: Well, let's say if worse comes to worse and FNCB turns it down. If FNCB turns it down in New York, then we don't have a deal, it's back in your hands.

"Mr. Guerrero: Well, you would have a deal at that point, see, but then you would have to look for the money someplace else.

"Mr. Guerrero: Is there any source where you could get this money if you don't get it from the FNCB?

"Mr. Holmes: Yeah.

"Mr. Guerrero: If we make the agreement flexible as to that-

"Mr. Holmes: I'd rather make it-I don't want to say 'lending institution' in other words-

"Mr. Halliday: Any source.

"Mr. Guerrero: AnY source. Any source, as long as the money comes in.

"Mr. Holmes: Any other source.

"Several: Any other source.

"Mr. Holmes: All right. Twenty thousand from Holmes.

"Mr. Guerrero: Is that agreeable?

"Several: Yes." R.T. 449-456.

Appellants contend that while David Ulloa did in fact attend the August 3rd meeting, none of Appellees' witnesses at the trial testified that Ulloa was present throughout the entire meeting, But neither do Appellants point to any testimony which indicates that Ulloa was *not* present throughout the meeting. Both the transcript and minutes of the August 3rd meeting clearly indicate that Ulloa was present. Furthermore, while the minutes of the August 3rd meeting specifically note the fact that at one point in the meeting, Holmes left the meeting, no such similar notation exists With respect to Ulloa. Finally. even it Ulloa was not

4th Agreement embodying the sale of the MCS stock to Holmes is absolutely devoid of any reference to the procurement of any loan commitment either as a condition precedent or subsequent to the sale. As previously indicated, this Agreement was witnessed and signed by D. Ulloa without objection.

Even assuming, *arguendo,* that fraud should have been properly included by the trial court as an issue for trial, the above evidence demonstrates that the trial court did not commit clear error in holding that the plaintiffs failed to fulfill the requirements of a constructive trust. In light of this Court's holding, we need not reach the remaining issues raised by Appellants.

The judgment of the district court is hereby AFFIRMED.

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present throughout the entire meeting, he witnessed and signed the August 4th Agreement without objection. That agreement contained no promise or representation by Holmes that he would procure a inn loan commitment from FNCB or any other lending institution.

GUAM ECONOMIC DEVELOPMENT AUTHORITY, et al.,
Plaintiffs-Appellees,
v.
David J. ULLOA, et al.,
Defendants-Appellants.

No. 86-2535.

841 F.2d 990

United States Court of Appeals,
Ninth Circuit

Argued and Submitted April 10, 1987

Decided March 14, 1988.

Judgment creditor brought motion authorization to enforce judgment. United States District Court for the district of Guam, Cristobal C. Duenas, granted motion and appeal was taken. Court of Appeals, Poole, Circuit Judges held that: (1) judgment creditor's move for authorization to enforce judgment a expiration of five years was within discretion of District Court; (2) judgment creditor was not required to show exercise due diligence in attempting to enforce judgment in order to be granted motion authorization to enforce judgment after expiration of five-year statutory period; (3) service of notice of motion for authorization to enforce judgment upon attorney of record was adequate.

Affirmed.

1. Federal Civil Procedure §2691

Guam statute providing for five years to obtain writ of execution was not statute of limitations or repose and merely provided limited time within which judgment creditor could obtain writ of execution as of matter of right, while thereafter, issuance of writ called for exercise of trial court's discretion, so that upon expiration of five-year period in which execution was available as of matter of right, judgment bad not lapsed or expired because enforcement was still available by leave of court, by motion, or by judgment in original pro. seeding based upon supplemental pleadings. Guam Code Civ.Proc. § 685.

2. Federal Civil Procedure §2691

Notwithstanding fact that five-year period during which judgment creditor could obtain writ of execution as of matter of writ had expired, judgment did not lapse or expire, so that grant of judgment creditor's motion for authorization to enforce judgment eight years after judgment was obtained was within discretion of district court; motion for authorization to enforce judgment was not barred either before or after amendment to code substituting six-year time requirement Guam Code Civ. Proc. §§ 336, 681, 685.

3. Federal Civil Procedure §2691

Under Guam statute, judgment creditor was not required to demonstrate exercise of due diligence in attempting to enforce judgment in order to entitle judgment creditor to grant of motion for authorization to enforce judgment eight years a judgment was obtained. Guam Code Proc. § 685.

4. Federal Civil Procedure §2691

At time judgment creditor served notice of motion for authorization to enforce judgment upon judgment debtor's former attorney, former attorney remained judgment debtor's attorney of record, so that under federal rule, notice was adequate. Fed.Rules Civ.Proc.Rule 5(b), 28 U.S.C.

John A. Spade, and David A. Mair, Mair, Hogan & Spade, Agana, Guam, defendants-appellants.

Richard L. Johnson, Klemm, Blair, Sterling & Johnson, Agana, Guam, for plaintiffs-appellees.

Appeal from the United States District Court of Guam.
Before POOLE, NORRIS and BRUNETTI, Circuit Judges.
POOLE, Circuit Judge:

David, Juanita and Richard Ulloa (hereinafter collectively "Ulloa") appeal from order of the district court granting motion of Western Systems, Inc. ("WSI" for an order enforcing judgment. We have jurisdiction under 28 U.S.C. § 1291, and affirm.

The District Court of Guam, sitting as a local court of original jurisdiction, entered judgment for WSI and against Ulloa and various other defendants on November 1977. Thereafter WSI made numerous unsuccessful attempts to collect from Ulloa. By May 1979 it became apparent that further attempts at enforcement would be fruitless; accordingly, WSI focused its collection energies on the remaining

judgment debtors. On July 15, 1986, more than eight years after entry of judgment, WSI sought further enforcement authorization pursuant to Guam Code of Civil Procedure Section 685.[1] That motion was granted and this appeal timely followed.

Ulloa questions the propriety of the district court's conclusion that § 685, as amended, authorizes the order. Section 685 interacts with two other Guamanian statutes. Section 681 provides that a writ of execution will issue as a matter of right for five years after entry of judgment; section 336 places a five year limit on the filing of a separate action to enforce a judgment Section 685, enacted in 1953, originally provided that

> [i]n all cases the judgment may be enforced or carried into execution after the lapse of five (5) years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the taking effect of this Code.

In 1982 the Guam legislature amended section 685 by substituting a six year time requirement Pub.L. No. 16-120. No other language was changed. Inexplicably, sections 681 and 336 retained their five year provisions. The apparent result is a one year gap wherein enforcement cannot be had by suit, writ or motion.

This gap, Ulloa contends, effectively extinguished the district court's power to enforce WSI's judgment. The judgment was entered more than five but less than six years prior to the effective date of the 1982 amendment Since the five year period of sections 681 and 336 had run, and section 685 by its terms will not revive a judgment "barred by limitation", WSI became fore er ineligible for discretionary process under section 685.

[1,2] Ulloa's analysis is flawed in number of respects. First and foremost section 681 is not a statute of limitations repose; it merely provides a limited time within which the judgment creditor m obtain the writ of execution as a matter right. Thereafter, under section 685, issuance of the writ calls for exercise the trial court's discretion.

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1 All statutory references are to the Guam California Codes of Civil Procedure.

Upon the e ration of section 681's five-year period, which execution is available as a matter right, the judgment has not lapsed or expired because enforcement of section 685 still available by leave of court, by motion or by a judgment in the original proceeding based upon supplemental pleadings. Since "supplemental" pleadings have relationship to prior pleadings in the same action, proper reading of section 685 would se to be that the judgment may be enforced that manner. Second, since section does not cause a judgment to *expire*, there is no moribund judgment to "revive" a section 685 is not offended by subsequent enforcement WSI's motion was not barred by the language of section 685 either before or after amendment It lows that the district court properly concluded that the 1982 amendment did not cause the judgment to expire and its plain terms permitted further enforcement of judgment reasonably interpreted, the final sentence of section 685 simply upholds the integrity of section 336; it does not speak at all to motions to enforce.[2] The California court of appeal has construed identical statutory language as speaking to the date of original enactment rather than the date of reenactment. See *Greeley v. Suey Sing Benev. Ass'n*, 28 Cal.App.2d 536, 538-39, 83 P.2d 54, 55 (1938). Under this reasoning, the final sentence of section 685 does no more than prohibit the revival of judgments which were barred when the statute took effect in *1953*. We conclude that the district court properly construed the statute.

[3] Ulloa next contends that even if a section 685 motion was available to WSI, it was not entitled to relief because it failed to exercise due diligence in attempting to enforce the judgment pursuant to section 681. Ulloa concedes, as it must, that the statute contains no express diligence requirement It insists, however, that such a requirement should be implied from California legal developments. This assertion lacks merit.

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2 The district court's conclusion is further supported by controlling case law. It established that California cases construe statutory language later adopted by Guam legislature cut controlling light the Guam provisions. *See Roberto v. Aguon*, 519 F.2d 754, 755 (9th Cir.1973). The district court arrived at the same conclusion without identifying its route. Despite lack of explanation, it is the result, not reasoning, upon which an appellate passes judgment. *Myers v. United States Parole Comm'n*, 813 F.2d 957, 959 (9th Cir.1987).

Guam section 685 is virtually identical to the 1895 version of California's section 685. The California legislature amended its statute in 1933 to require a demonstration of diligence by providing that the movant must include an affidavit explaining his failure to proceed in compliance with section 681.[3] Ulloa contends that the California model is highly persuasive that a diligence requirement was intended by the Guam legislature in 1953.

In our view, the California experience proves the contrary. The Guam legislature's 1953 decision to adopt the 1895 version rather than the 1933 version of the California statute constitutes an implicit rejection of the 1933 amendment. Even when amending the statute with almost thirty years of hindsight, the Guam legislature eschewed California's due diligence language. Thus the 1982 amendment of section 685 may more logically be considered a reiteration of the 1953 rejection of California's due diligence requirement. The extension of the *Roberto* rule of construction advanced by Ulloa would effectively hold the Guam legislature hostage to the enactments of its California counterpart. That rule cannot be applied to impose requirements that the Guam legislature has implicitly rejected. We will not so extend Roberto. The district court's apparent conclusion[4] that diligence is not required under section 685 was correct.

Ulloa misses two further points to impeach that conclusion. First it argues that California case law between 1895 and 1933 read a due diligence requirement into the 1895 version of the statute. Second, it argues that the Guam legislature could not have intended to confer unbounded discretion upon the local trial courts in authorizing execution because section 685 is meant to be only a limited exception to section 681. Moreover, it argues that subjecting judgment debtors to such latitude contravenes basic considerations of fairness.

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3 In 1982 California substantially revised its statutory scheme for enforcement of judgments. *See* California Code of Civil Procedure §§ 683.010-683.320.

4 Again, the reasoning of the district court is not set out with precision or clarity. However, our review of its Memorandum Order convinces us that the court concluded that an affidavit demonstrating diligence is not required by the statute.

These contentions are unpersuasive. The California decisions construing the section 685 of 1895 vintage impose no requirement of due diligence, or other standard of vigor. *Butcher v. Brouwer*, 21 Cal.2d 354, 357, 132 P.2d 206, 206 (1942). *See, eg., Creditors Adjustment Co. v. Newman*, 185 Cal. 509, 197 P. 334 (1921); *Weldon v. Rogers*, 159 Cal. 700, 115 P. 464 (1911); *Harlan v. Harlan*, 154 Cal. 341, 98 P. 32 (1908); *Bredfield v. Hannon*, 151 Cal. 497, 91 P. 334 (1907); *Doehla v. Phillips*, 151 Cal. 488, 91 P. 330 (1907). Indeed, the 1933 amendment was animated by the legislature's desire to curb the trial court's discretion to grant the writ *See* 5 B. Witkin, *California Procedure*, at 3554 (2d ed. 1971). Thus, pre-1933 California case law fortifies rather than undermines the district court's conclusion.

As to the second point, we see nothing unreasonable in the entrustment of broad discretion to the trial court to grant the writ under section 685. In any case we are convinced that this is what the legislature intended; it is not our province to question its wisdom. We hold that the district court correctly concluded that due diligence is not required under section 685. We find it necessary to reach the court's alternate holding that due diligence was in fact demonstrated by WSI.

[4] Ulloa's final contention is that the service of notice of WSI's motion was defective. WSI served the notice of motion on Herman Skipper, Ulloa's former attorney. However, at the time Skipper remained Ulloa's attorney of record. Under Federal Rule of Civil Procedure 5(b), notice served upon a party's attorney of record is adequate.[5] We hold that Ulloa received sufficient notice of WSI's motion.

Since the district court correctly construed the Guam statute, we AFFIRM.

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5 It is undisputed that Ulloa received adequate actual notice to respond to the motion.